

THE
FORM of PROCESS
IN THE
Court of SESSION,
AND
Court of TEINDS.

To which is prefixed,
A General Account of the COL-
LEGE OF JUSTICE.

By JOHN RUSSELL, Clerk to the Signet.

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EDINBURGH:

Printed by SANDS, MURRAY, and COCHRAN.

Sold by W. MILLER, and other booksellers in *Edin-
burgh*, and by T. CADELL in the Strand, *London*.

MDCCLXVIII.

FORM OF PROCEEDINGS

IN THE

Court of Session

AND

Court of Exchequer



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P R E F A C E.

THE administration of justice with dispatch, and at a small expence, has ever been an object of the attention of the legislature, as well as of the judges; but the multiplicity of rules which have been made for that purpose, has, in some measure, prevented the good effect of them. Rules for proceedings in courts of law should be simple and few. If they are not so, the complete execution of them becomes almost impracticable; and, by a relaxation in part, the authority of the whole comes to be shaken.

At present, the rules for proceedings in the Court of Session are so intricate, and the several acts and orders made relating to them, are so numerous, that the study thereof is become extremely difficult and laborious.

To remedy this inconvenience, an attempt is made in the following sheets to abridge that labour, by a proper arrangement of the several acts and orders now in force, leaving out such as

are become obsolete, and bringing the whole within a narrow compass.

In this arrangement, the order of time in which the several steps of process occur, is observed; and a few observations are, with great diffidence, made upon such parts of our forms as seem to need amendment.

The Lords of Session being likewise Commissioners for plantation of Kirks and valuation of Teinds, and that business being carried on much in the same manner as the business of the Court of Session, it is thought proper also to subjoin the form of process in that court.

The great attention given at present by the judges to the quick dispatch of business, gives reason to hope, that some new regulations may be made to shorten the duration, and lessen the expence of law-suits. If, by bringing the whole rules of proceeding under one view, the author shall be so fortunate as to contribute, in any degree, towards the obtaining these ends, he will think his labour well bestowed.

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ABBREVIATIONS EXPLAINED

1878. Act of Parliament concerning the
regulation of the Fisheries in
1872; and articles of regulation
concerning the fishing made by
King William in 1802 and 1803.

Act of Parliament

Act of Parliament concerning the
regulation of the Fisheries in
1872; and articles of regulation
concerning the fishing made by
King William in 1802 and 1803.

Articles of regulation made by
King William in 1802 and 1803.

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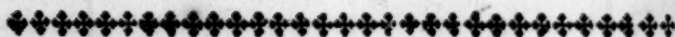
ABBREVIATIONS EXPLAINED.

Act reg. Act of parliament concerning the regulation of the judicatories in 1672; and articles of regulation concerning the session, made by King William in 1695 and 1696.

A. S. Act of Sederunt.

St. In. Lord Stair's Institutions of the law of Scotland.

Hope's pract. ob. Sir Thomas Hope's practical observations on the law of Scotland.



E R R A T A.

Pag. 2. lin. 21. for ; and the read . This

Pag. 36. marg. for 1692. read 1695.

Pag. 72. marg. for Act 1686. read p. 1686.

Pag. 8. Instead of what is contained between lin. 11. and lin. 17. read as follows, viz.

Formerly during the vacation of the court of session, no inferior judge could hold courts for civil causes without a dispensation from 20Geo.II. the court of session; but now sheriffs are an c.43. § 29. exception from that rule. These dispensations are, &c.

GENERAL ACCOUNT

O F

The COLLEGE of JUSTICE.

ANCIENTLY many causes, J. I. p. 2.
particularly complaints a-^{cap. 45.}
gainst the judges ordinary,
were heard by the King and coun-
cil. But this having been found
inconvenient, a new court, named
the *Session*, was established by James
I. in 1425, for determining such J. I. p. 3.
causes. c. 65.

This court, which was only oc-
casional, and ambulatory, fell soon J. III. p.
into disuse; and by two several acts ^{1469, c.}
of James III. in 1469 and 1475, ^{26.} J. III. p.
complaints against the ordinary ^{1475, c.}
judges were ordered to be tried ^{62.}
before the King and council.

In 1487, processes at law being
greatly multiplied, and being
brought before the King and coun-
cil in the first instance, it was
found necessary to remedy this in-

A convenience,

J. III. p. convenience, by providing, that
1487, c. no actions should be tried by the
105. King and council, excepting the
King's own causes; and actions
and complaints made by kirkmen,
widows, orphans, and pupils; ac-
tions of strangers of other realms,
and complaints made against offi-
cers for default in the execution of
their office, or where the officers
themselves are parties.

The council mentioned in these
acts of parliament was not the pri-
vy council: it was called the *daily*
council; and was afterwards or-
J. IV. p. dered to sit in Edinburgh, or such
1503, c. other place as the King should ap-
58. point, to decide all manner of
summonses in civil matters, com-
plaints, or causes, daily as they
should happen to occur; and the
council is declared to have the
same power as the Lords of Session
had.

In the year 1532, the College of
J. V. p. Justice was instituted by James V.
1537, c. And in 1534 it was ratified by the
36. Pope, and was afterwards confirm-
ed by parliament in the 1537. This
court

court having come in place both of the court of session and daily council, the judges in court had the appellation of *Lords of Council and Session*; they were also called *Lords of Session*, or, *Senators of the College of Justice*.

It appears from the first act of institution, that the College of Justice then consisted of the judges and servants of the court, the clerks to the signet, and some advocates or procurators of best name, knowledge, and experience, admitted under the name of *general procurators of the council, to procure in all actions*. The number of these advocates was limited: which seems to have been unnecessary at that time; for though by the statute ten are allowed, yet there are only eight named: such was the scarcity of lawyers of knowledge and experience in that age. To supply this defect, as well as to regulate the admission and conduct of advocates thereafter, it is provided by the said act, That “ gif any other cunning men will desire to be admit-

“ted to the office of advocacy
 “and procuration, they shal be re-
 “ceived, with advice of the Lords,
 “for completing of the said num-
 “ber; and that thir procurators
 “procure for every man for their
 “wages, but gif they have rea-
 “sonable excuse.”

S E C T. I.

Of the Judges.

THE court was at first composed
 of a president and fourteen or-
 dinary judges, one half churchmen,
 and the other half laymen, with
 three or four other Lords to be
 named by the King. The chan-
 cellor, when present, was to preside,
 and have a vote. The quorum of
 the judges is declared by the act
 to be ten, with the chancellor or
 president; and their sentences are
 ordained to have the same effect as
 the decreets of the Lords of Session
 had formerly.

Since the union of the kingdoms,
 the office of chancellor of Scotland
 has

has been suppressed ; and the nomination of extraordinary Lords ^{10 G. I.} was, in the year 1724, taken away ^{c. 19.} by act of parliament.

The court at present consists of a president and fourteen ordinary judges, all laymen ; whereof nine are a quorum : and in absence of the Lord President, one of the ordinary judges is named by the court to preside for the time. At what time this alteration of the quorum happened, does not appear ; but from the tenor of the act ^{J. VI. p. 1587, c. 44.} 1587, empowering the court to judge of the act of oblivion, it must have been before that time.

The judges are named by the King, for life ; and undergo a trial : though the court has now no power of rejecting ; but if they ^{10 G. I.} object, must report it to the King ; ^{c. 19.} who may over-rule or allow the objection.

By the 19th article of the union of the kingdoms, no person is capable to be presented as an ordinary judge in the court of session, excepting such as have served in

the college of justice, as advocates, or principal clerks of session, for the space of five years, or as writers to the signet for the space of ten years. Provifo, That no writer to the signet shall be admitted to be a Lord of Session, until he shall have undergone a private and public trial, upon the Civil law, before the Faculty of Advocates, and shall be found by them qualified for the said office, two years before he shall be named to be a Lord of Session. These qualifications are declared to be subject to alteration by parliament.

Ch. II. p.
3. 1681,
c. 13.

The Lords cannot sit or vote in causes of their near relations; such as father or son, brother or sister, whether by consanguinity or affinity; nor in the cause of an uncle or nephew by consanguinity.

The jurisdiction of the court extends to all civil actions, and in some particular cases, to the inflicting of corporal punishment for crimes, such as forgery or fraud.

The

The court, by virtue of a *nobile officium* inherent in it, has the power of judging in equity, as well as in law. It has also a power, in the second instance, to judge of the interlocutors and sentences of inferior courts; and, upon special reasons, the judges may review even those of their own court. They are likewise impowered to make rules and regulations concerning the manner and order of proceeding in their court. Ja. V. 1540, c. 93.

Actions not exceeding 200 merks Act. reg. 1672, § 16.
 Scots in value, are, by the act of regulations 1672, discharged to be brought before the court in the first instance, unless for special reasons, to be set forth in the bill, or warrant of the summons, and admitted of by the Lord Ordinary, after due consideration had thereof; “ excepting causes of the
 “ members of the college of justice, and those of cooks, vint-
 “ ners, and others, in burgh, for
 “ furniture taken off from them,
 “ by such as dwell not within the
 “ shire

“shire where the furniture was
“taken off.”

The exception in this act is, by the practice, extended to all actions against debtors residing in different shires; and the clause, ordaining the special reasons to be set forth in the bill of the summons, and to be considered by the Lord Ordinary, has become obsolete.

During the vacation of the court of session, inferior judges cannot hold courts for civil causes without a dispensation from the court of session. These dispensations are granted upon an application, by way of common bill, presented by the clerk of the bills to the Lord Ordinary officiating on the bills: and the time of such dispensation was formerly limited to the 20th March, and 20th August; but since the alteration of the style, it is prorogued to the 2d of April, and 2d of September.

Order of
court, 21st
July 1696

Ditto, 16th
Feb. 1753

A& W.
1693, c.
18.

All judgements and orders of the court must be signed by the President, in presence of a quorum
of

of the Lords sitting in judgement ;
and for that reason his Lordship al-
ways subjoins to his subscription,
I. P. D. ; i. e. *In presentia Domino-*
rum.

All the judges except the Lord President sit by turns weekly in the
outer house, for hearing and determi-
ning causes in the first instance ;
and the court sits in what is called
the *inner house*, for the determina-
tion of special causes.

Act W. &
M. sess. 4.
c. 19. &
21.

The Lord who sits for the week,
is called *the Ordinary for the outer*
house. His sentences are liable to
the judgement of the court, upon
application of any of the parties :
but if no such application be made
within a certain limited time, his
decision becomes final ; and is held
a decree of the court, as much as
if it had been pronounced by the
whole Lords in the inner house.

The Lords also, by turns, week-
ly, advise all bills praying war-
rants for summonses and sum-
mary diligence, and also bills of
suspension and advocacy. The
Lord so officiating is called *the*
Ordinary

Ordinary on the bills. This duty requires the attendance of the judges in time of vacation, as well as during the sitting of the court.

Two of the ordinary judges are also appointed weekly, by turns, to attend in the afternoon, for the examination of witnesses. These Lords are called *the Ordinaries on oaths and witnesses*; and have the power of judging in all questions relating to the taking of proofs; such as, objections to witnesses, and the propriety of questions put to them.

One of the ordinary judges is also appointed weekly, by turns, to audite and prepare the processes in which proofs have been taken, and to report a state thereof in writing to the court. The judge so officiating is called *the Ordinary on concluded causes*.

The interlocutors of these Ordinaries, as well as those of the Ordinaries on the bills, are liable to the judgement of the court.

S E C T.

S E C T. II.

Clerks, and other Officers of Court.

THE clerks of court are twelve in number. Six of them are principal clerks, named by the King. These officiate in the inner house. The other six act by deputation from the principal clerks, and attend the business of the outer house.

The clerks keep three offices for their papers; in each of which there are two principal, and two depute clerks; and nine extracters, whose business it is to collate and extract the decreets and sentences of the court; which extracts are signed by one of the principal clerks.

Besides these, there are two principal clerks to the bills, named by the King, and one depute, commissioned by them; whose business it is to present bills to the Ordinary on the bills, and to write all interlocutors in that department. There are also two other assistants

assistants in that office, named by the principals.

All these clerks have their commissions for life.

The court also has four macers, whose business it is to call the causes, and to execute the orders of the court. Three of these macers have their commissions from the King; the other is in the gift of Mr Moncrieff of Reedy.

There is likewise a clerk to the minute-book; whose business it is to keep a minute-book of all the proceedings of the court. This officer has his commission from the King, for life.

Act reg.
1672, § 5.

Next to him are the two keepers of the rolls for the inner and outer house, respectively. The nomination of the first of these was originally in the Lord Chancellor; but since the union of the kingdoms, he has been named by the Lords. The person named is usually the Lord President's clerk; and the act of nomination bears,

A. S. 14th
June 1760

That he shall hold the one office as long as he continues to serve the Lord

Sect. II. *Officers of Court.* 13

Lord President in the other, or until a commission shall appear, in terms of the act of regulations 1672.

The keeper of the outer-house roll is appointed by the Lords, and has his commission for life.

Act reg.
1672,
§ 2.
A. S. 16th
Nov. 1689

Every one of the judges has also a private clerk for keeping his hand-rolls, taking care of processes which are to be advised by him out of court, and writing his interlocutors.

The last officers are the two keepers of the parliament-house; the nomination of whom is settled by contract between the Lords and the Magistrates of Edinburgh; by which it is agreed, that these two bodies shall have a power of nomination alternately.

A. S. 23d
June 1694
Ibid. 29th
June 1757

The court has also a common seal: which is never used but upon particular occasions; such as reports to his Majesty or parliament, and commissions for taking proof in foreign parts.

The court of session is ordered to sit down on the 1st of November,

J. VII.
p. 1686.
c. 5.

ber, and to rise the last of February, for the winter-session; and to sit down for the summer-session on the 1st of June, and to rise the last of July.

24 G. II.
c. 23.

In the act for changing the style, the sitting of the session is excepted; so that the winter-session commences now upon the 12th November, and ends the 11th March; and the summer-session commences the 12th June, and ends the 11th of August.

2 Geo. III.
c. 27.

The Lords, by a late act, are impowered to adjourn the session, on such day, betwixt the 20th December and 20th January, yearly, and for such time, as they shall judge expedient, not exceeding the space of twenty days.

The court sits every week-day during the session, Monday excepted.

S E C T. III.

Faculty of Advocates.

THE profession of an advocate, ever since the institution of the

the college of justice, has been honourable. Out of this body, almost exclusively, the Judges of the court of Session and Justiciary, and part of the Barons of Exchequer, are nominated; and they have the sole privilege of being appointed Sheriff-deputes in the several counties.

It has already been mentioned, that, by the first institution of the court, advocates were to be admitted by the judges; and it appears, from many petitions to the court, so late as the year 1664, that advocates, upon their entry, were not subjected to an examination. The ordinary method of education of young gentlemen intended for the bar, was, by serving advocates in practice for a number of years; after which, upon an application to the court, setting forth their service, and a certificate from his Majesty's advocate, and the other advocates, of their honesty and abilities, they were admitted to the office of procurator.

Minutes of
Faculty,
Nov. 7.
1664.

This method was afterwards altered, and advocates, before their admission, were obliged, either to undergo an examination by the Faculty in the Civil law, or to pay an additional sum at their entry.

A.S. 18th
Jan. 1684.

By an act of the Faculty, 1st January 1678, the fees of entering advocates were settled, at 500 merks for such as should enter upon examination; and 1000 merks for such as should enter, upon petition to the Lords, without examination. This act was afterwards ratified by an act of federunt: but with a reserved power to the Lords to modify the 500 merks, when they should find it reasonable.

A. S. 6th
July 1688

By another act, in 1688, the method of trial laid down by the Faculty of Advocates is again approved; and it is thereby ordered, that for the future, when any persons shall apply to the Lords to be entered advocates, without undergoing the ordinary trial, they shall be examined by the Lords in presence,

Sect. IV. *Clerks to the Signet.* 17

fence, concerning their knowledge of the styles, the form of process, and of the principles of the law of Scotland.

In 1720, the fees of entering advocates were raised to L. 40 Sterling; and, by a late regulation, advocates, before their admission, are subjected to a trial of their knowledge, both in the Civil law, and in the Municipal law and practice of Scotland.

Act of Faculty, 5th Jan. 1720

A. S. 2871 Feb. 1750

The office and duty of an advocate is so well known, and so fully described by many eminent authors on the law, that it is unnecessary here to recapitulate it.

S E C T. IV.

Clerks to the Signet.

THE institution of Clerks to the Signet is as ancient as that of Secretary of State: they are properly his clerks, and act by commission from him, or from the

B 3

keeper

keeper of the signet, when that office is held by a person other than the Secretary.

In the old acts of parliament, they are called *Clerks to the Signet*; in later acts, they are sometimes called *Clerks*; and in other parts of the same acts, they are called *Writers to the Signet*.

The admission of a clerk to the signet proceeds upon trial of his knowledge, both of the law, and of the form and style of writings; and the society has a power of rejecting, in case upon trial the candidate shall not be found qualified. The society has also a power of suspension or deprivation of their members for malversation in their office.

No clerk to the signet can be admitted without his having previously studied the law, and served as an apprentice to one of the clerks to the signet for five years: and before he is admitted, he must swear to his actual service during the whole time of his indenture.

The

The members of this society have ^{w. & M.} the exclusive privilege of preparing ^{sess. 5.} and signing all writs which pass ^{c. 40.} the signet, with some few exceptions; and also of preparing and signing all bills of advocacy and suspension. They have also the exclusive privilege of preparing and signing signatures, and other warrants of charters and writs which pass the other seals, and are presented to the Barons of Exchequer; and they are declared to be ^{Act reg. 1672.} sole clerks to appraisings led upon ^{§ 23.} dispensation, and to services before the macers.

From the education and practice of the clerks to the signet, in the proper business of their office, it is, with reason, presumed, that they are much conversant in the art of conveyancing: and therefore they are generally employed and consulted in the making of settlements, tailzies, or conveyances of consequence.

S E C T.

S E C T. V.

*Persons intitled to the Privileges of
the College of Justice.*A.S. 23d
Feb. 1687

THE members of the college of justice are intitled to certain immunities and privileges, which have been ratified by parliament; and these privileges are extended to the servants of the members, and to certain other persons having a connection with the college.

The persons privileged by the act of federunt are,

The Lords of Session.

Advocates.

Clerks of Session.

Clerks of the Bills.

Writers to the Signet.

Depute-Clerks of Session, and one Substitute for registrations in each office.

Three Depute-Clerks of the Bills.
Clerks of Exchequer.

Directors

Sect. V. *Privileged persons.* 21

Directors of the Chancery, and their depute.

Two Clerks of Chancery.

Writer to the Privy Seal, and his Depute.

Clerks of the General Register of Seisins and Hornings.

Macers of the Session.

Keeper of the Minute-Book.

Keepers of the Rolls of the outer and inner house.

One actual Servant * of each Lord of Session.

One Servant of each Advocate.

Four Extractors in each of the three offices of the Clerks of Session.

Two Servants employed by the Clerk-Register for the keeping of the public registers.

Keeper of the Session-House, and Keeper of the Advocates Library.

By the act for establishing the court of exchequer in Scotland, it is provided, that the Barons of

6 Ann.

c. 26.

§ 11.

* The persons mentioned as servants in this act are writing clerks.

Exchequer

Exchequer in Scotland, and members of the said court, shall have the same privileges and immunities as the members of the college of justice have ; excepting only that they may be pursued in justice before the Lords of Session, for causes not competent to the court of exchequer.

S E C T. VI.

Agents and Solicitors.

THough agents and solicitors, by their office, are not members of the college of justice, they are so necessarily connected with the business of the court, that it may be proper here to take notice of them.

While the education of young gentlemen intended for the bar, depended on their serving advocates in practice, these young gentlemen, during their service, acted as agents, and their masters directed the conducting of the processes ;

processes ; and therefore all other agents were discharged, as burdensome to the lieges. But since that practice has ceased, agents have become absolutely necessary ; and they are now held by the court to be the sole conductors of processes, and as such, answerable for every omission or wrong done in the management of them : for which reason the penalties and fines formerly imposed upon the advocates, are now laid upon the agents.

Act reg.
1672.
§ 31.

The office of an agent or solicitor is a very great trust. He is generally the original adviser of the action. The advocate takes his information from him, and gives his opinion according to the case or memorial prepared by the agent. The proceeding in or delaying of the cause must depend upon the agent, and the advocate does not move one step without him. It is therefore of great importance to the client, that the agent be a man of integrity, knowledge, and skill in his profession, willing

willing and able to conduct the process fairly and properly for his client, with such candour as to avoid all trick and chicanery, and to prevent all frivolous, vexatious, or unnecessary law-suits.

A. S. 10th
Aug. 1754

The agenting-business being open to every one without distinction, many persons who were not bred in the law, undertook that branch of business; by which great inconveniencies arose. To remedy these, the court, in 1754, made an act of federunt, prohibiting all persons, excepting clerks to the signet, and first clerks to an advocate, to act as agents in causes before the court, unless they shall have been inrolled as such, after passing an examination by one or two of the judges.

This was a most judicious regulation: but it is worth consideration whether it should not have gone farther, and settled, as far as possible, the fees of such agents, not only for the benefit of the suitors, but also for an encouragement to men of character to undertake

undertake the agenting-busines, which includes a most important trust.

In the same view it were to be wished, that in imposing fines, the acts of federunt had always made a distinction between defaults that appear intentional, or owing to gross neglect, and those which are not so. In the former it is not only proper that the suffering party be indemnified, but also that, for the sake of example, a fine be given to the poor. But when the fault is neither intentional nor gross, though perhaps attended with loss to the adverse party, the fine should only go to make up such party's damage.

The Lords private clerks, and the servants of the Clerks of Session, are discharged to act as agents, excepting in their masters and their own proper causes. A. S. 7th
Nov. 1690

Extracters are also discharged to act as agents, and agents are prohibited to act as extracters. A. S. 4th
Jan. 1751.

C F O R M

2000

FORM 10

FORM of PROCESS

In the Court of Session.

PART I.

Processes commenced in the court
of Session.

CHAP. I.

Preliminaries of Process.

THE preliminaries of process consist of the summons, which contains the libel, citation given to the defender *, execution or return of the messenger, and the proceedings before the hearing of the cause by the Lord Ordinary.

A summons is a writ in the King's name, and under his signet. The form of it is well known by the clerks to the signet, who have the sole and exclusive privilege of signing and issuing all

* Defendant.

summonses before the court of session. In general, it must contain a recital of the pursuer's claim *, and a conclusion for a decret; the terms of which should be accurately set forth in the libel.

The summons must also contain a warrant for citing the defender to appear at a time certain, to shew cause why decret should not pass against him; with certification, that if he shall not appear, decret shall go out against him, in terms of the libel.

J. III. p. 1.
c. 6.

To give the defender time to prepare his defence, and to attend the court, in ordinary process, twenty-one free days are allowed him after citation, before the first day of compearance, in case he resides in any part of Scotland.

J. VII.
p. 1. sess. 1.
c. 43.

Orkney and Shetland are excepted from this rule. If the defender resides there, he is allowed forty days notice.

Some processes, by their nature, require extraordinary dispatch.

* Plaintiff's claim. The word *complainer* is also often used instead of *pursuer*.

In

In these the law has allowed a shorter warning to the defender than twenty-one days ; and for that reason such summonses are said to be privileged. Anciently these summonses were not precisely ascertained, and were issued only by special warrant of the court, upon a bill offered for the pursuer ; but afterwards they were particularly defined and settled by A. S. 29th June 1672 act of federunt.

Privileged summonses on one diet of fifteen days.

1. Summons of recent spuilzie, if raised within fifteen days after the committing of the spuilzie. Ibid.
2. Summons of ejection.
3. Summons of intrusion, and succeeding in the vice.

Privileged summonses on two diets of six days each.

1. Summons of aliment, Ibid.
2. exhibition,
3. forthcoming,
- C 3 4. Sum-

4. Summons of transference,
5. pointing of the
 ground,
6. wakening,
7. special declara-
 tor,
8. suspension,
9. preventor,
10. transumpt, and
11. removing.

Summonses instructed by writing require only one diet*; but when the pursuer's title is not instructed by writing, and is to be verified by a proof *pendente lite*, the summons must contain two diets. Anciently these last summonses also contained only one diet; and when the summons was called, the pursuer obtained a new warrant from the court to cite the defender to a peremptory day. This was called *summons of continuation*. But this method being found inconvenient, was discharged; and it was made lawful to include both

Ch. II.
p. 2. sect. 3.
c. 6.

* Day of appearance.

first

first and second diets in the original summons.

Before the act of Charles II. any person, as sheriff in that part, appointed by the summons, might have given a citation to the first diet; but in some cases the citation to the second diet behoved to be by messengers at arms. By that act the ancient method of execution is preserved, and summonses are ordained to be directed to sheriffs in that part, and messengers at arms, respectively; and two different citations were necessary. But by an act in 1693, W. & M.
P. 1693.
C. 12. one citation is allowed to be given for both diets at one time, by a messenger at arms.

The second diet, when the defender resides in Scotland, is upon six days warning.

If the defender resides in Edinburgh or Leith, the second diet may be upon twenty-four hours warning. A. S. 29th
June 1672

By an act of federunt in 1672, A. S. 11th
July 1672. summonses containing two diets were ordered to be signed by the clerk-

clerk-register ; or, in his absence, by one of his deputes, or the ordinary clerks of session. This act was looked upon as an infringement of the privileges of the clerks to the signet ; and accordingly, by

A& W.

p. 1. sess. 5.

c. 40.

an act of parliament in 1695, “ for reviving and preserving the
“ good order that ought to be
“ kept in the passing of writs under the signet, it is statute and
“ ordained, that all writs passing
“ under the signet, called *the signet of the Lords of Session*, be subscribed by a writer, *as clerk to the signet* ; excepting allenary letters of diligence in processes before the session : and the keeper of the signet is discharged to affix the same to any letters not subscribed as above, any custom or practice to the contrary notwithstanding.”

J. V.

p. 1540.

c. 75.

If the defender resides in Scotland, he must be cited, either personally, or at the place where he has his actual residence for the time. But if he does not reside in Scotland, the summons must contain

tain a warrant to cite him edictally at the market-cross of Edinburgh, pier and shore of Leith, upon sixty days warning for first diet, and fifteen days for the second diet.

The execution of the messenger Ch. II. p. 2. sess. 3. c. 6. must bear expressly the names and designations of all the parties, pursuers and defenders; and must be signed by the messenger and two witnesses.

The defender must be served A. S. 16th Feb. 1723. with a full copy of the libel, in so far as concerns him.

In the last act, the following summonses are excepted from that rule.

Summons of adjudication,
 of mails and duties,
 of ranking and sale,
 of exhibition *ad deliberandum*,
 for chusing curators,
 of transumpt,
 of wakening,
 of multiple - poinding,
 and
 of poinding of the ground.

But

But in the laſt of theſe, the heritor muſt get a full copy of the libel; though it is unneceſſary to give ſuch copy to the tenants.

A. S. 1ſt
Jan. 1726.

Summons of forthcoming was afterwards added to the exceptions.

Act. reg.
1695.
§ 28.

To avoid the confuſion that often happens in actions againſt debtors, where a multitude of debtors are called, it is provided by the act of regulation 1695, that there ſhall not be above fix defenders called in the ſame ſummons. When ſuch ſummonſes are firſt called, a roll of all the defenders muſt be put up on the wall of the outer houſe.

The firſt part of this rule is gone into diſuſe, and ſummonſes are raiſed againſt any number of defenders. But by the practice of the court, the ſummons can only be called againſt fix of the defenders at one time, in the outer-houſe roll; by which means great confuſion ariſes from having different Ordinaries to one proceſs.

By

By the act instituting the college of justice, summonses were ordained to be called according to the order of a table, *i. e.* roll. To ascertain the time of tabling, the clerk marked the date of tabling upon the summons; for which he received a fee. This order of calling summonses was altered by the act of regulations 1672; but the form of tabling is yet continued, upon account of the clerk's fee.

Both diets of the summons must be in time of session, and must be passed before the summons can be tabled.

The last part of this rule occasions an unnecessary delay. There appears to be no reason why the summons should not be allowed to be called upon the first day of compearance. Anciently the summons was called upon that day, and a new warrant was granted for citing the defender to a second diet. By the present practice, the pursuer reaps no benefit, in point of dispatch, by allowing the two diets to be included in one summons:

mons: but if the summons were allowed to be called upon the elapse of the first diet, the preliminaries of out-givings and returns might be proceeded in during the running of the second diet.

Summonses containing only one diet are not tabled.

A& reg.
1690.
§ 21.

After the summons is tabled, it must be called by the clerk in the outer house; and if there be no compearance for the defender, the summons may be inrolled in the next week's regulation-roll. Though this calling is not in presence of the judge, and the appearance is only entered by an advocate's clerk, in name of his master; yet it is held to be a judicial step of procedure, so as to keep the process alive. But this can only be done once.

A. S. 26th
Feb. 1718

If an appearance be made for the defender, the clerk marks the advocate's name who appears for him.

The summons, with the writings founded on by the pursuer, must be given to the defender's advocate

advocate to be considered; and, to prevent the loss of papers, as well as to ascertain the time of giving out the summons, a minute is marked on the back of the summons, and signed by the pursuer's advocate, mentioning the date of outgiving, and the whole writings given to the defender's advocate; who is obliged to return them to the pursuer's advocate within six days thereafter, with a minute signed by him, bearing the date of return, and that he has seen and returned the process.

A. S. 28th
Feb. 1662

Act reg.
1672. § 20

At the same time, there must also be returned to the pursuer's advocate, the defender's exceptions or defences to the libel, signed either by the defender himself, or by his advocate. These defences should contain an acknowledgement or denial of the facts libelled, otherwise the facts shall be held as acknowledged. If at the calling by the clerk, an advocate is, by mistake, marked for the defender who is not employed by him, the return must bear, that he is not for

A. S. 16th
Feb 1723.

D

the

the party; in which case the procefs is inrolled in the regulation-roll.

By the act of 1723, the defender is ordained to give in both his dilatory and peremptory defences; but by an act in July 1729, the defender is not obliged to give in his peremptory defences, until the dilatory defences are discussed. Which occasions delay: for altho', by this last act, when dilatory defences are separately returned, the defender, before the calling of the cause by the course of the roll, is ordered to consign in the clerk's hands 20 s. Sterling, to be given to the pursuer's agent, upon receipt, so soon as the dilatory defences shall be over-ruled; yet that part of the act is not observed.

A. S. 1st By an act of sederunt in 1726,
Jan. 1726. it is ordered, "That the defender,
§ 5. " in his answers or defences to be
" returned with the procefs, shall
" particularly set forth at length
" the state of the fact and case, as
" he admits and acknowledges it
" to be; as also the whole facts
" upon

“ upon which he is to found and
“ plead any defence: and if, by
“ reason of new discovery, the de-
“ fender be obliged to alter any
“ part of his answers or defences,
“ that he give in that alteration in
“ writing forty-eight hours at least
“ before hearing; and, in that
“ case, he shall be obliged to pay
“ 30 s. at least of costs to the pur-
“ suer: and that in the same man-
“ ner, if the pursuer shall be o-
“ bliged to amend any part of his
“ libel, he shall likewise give in
“ the amendment in writing, so
“ as the defender may have op-
“ portunity to see it forty-eight
“ hours before hearing, and shall
“ pay the foresaid sum at least of
“ costs to the defender: and that
“ the giving in of such amend-
“ ments and alterations, whether
“ upon libel or defences, be inti-
“ mated by the clerk in the outer
“ house, at the intimation of the
“ bills, and that the intimation be
“ marked by the clerk on the back
“ of the amendment.”

The last part of this rule is now in difufe.

A. S. 19th
Feb. 1742

These three last acts were at first only temporary, but are now made perpetual; and the observance of them would tend greatly to the dispatch of business. They were founded chiefly on the act of regulations 1672, which contains many wise regulations, and shows great abilities and knowledge of business in the persons who were concerned in the making of them.

Act reg.
1672 § 22

By the regulations 1672, it is provided, " That where-ever the
" defender's advocate is to found
" any defence upon writs * at the
" returning of the procefs, he also
" produce therewith the writs
" whereupon he intends to found
" any alledgeance, and give in the
" defence which he founds upon
" these writs, and mark the parti-
" cular clauses of the writs where-
" upon he founds ; otherwise no

* The word *writ* is here, and in many other of the acts, used in a general sense, and comprehends every kind of writing.

" respect

“ respect is to be had to the al-
 “ ledgeance * to be founded on
 “ those writs which were in any
 “ of the defender’s advocates
 “ hands, or which, or any copies
 “ thereof, were seen by the said
 “ advocates : which the pursuer’s
 “ advocates shall be obliged to re-
 “ turn within four days after they
 “ receive the same, otherwise com-
 “ plaint may be made against
 “ them, as against defenders ad-
 “ vocates for keeping up of pro-
 “ cesses ; and in case any other
 “ writs come to their hands after
 “ the returning of the process up-
 “ on which they will found, that
 “ in like manner they produce the
 “ same to the pursuer’s advocates
 “ before calling of the cause, un-
 “ der the same certification.”

If there are more defenders than Act reg. 1672. § 21
 one, the advocate to whom the
 summons is given out, shall return
 the process within four days ; which
 shall lie in the clerk’s hands for
 six days thereafter, to be seen by

* Allegation.

A. S. 16th
Feb. 1723

all the other defenders before the summons can be inrolled. These other defenders should also give in their exceptions to the libel, signed as before mentioned, within the said six days. But this last part of the act is now disuse.

If the advocate for the defender shall refuse to return the process within the time limited, upon complaint of the pursuer, the Lord Ordinary on the bills will grant warrant for apprehending and incarcerating the advocate or agent who detains the process, until he shall return it.

Act reg.
1672. § 20

The act of regulation 1672, authorises the Lord Ordinary on the bills to call the advocate who keeps up the process, and to fine him in L. 3 Scots for each day the process is kept, after requisition thereof by a notary, and L. 6 Scots for each day it is kept after the complaint is given in; one half of which fines is appointed to be paid to the pursuer, and the other half to be put into the poor's box but there is no power given by this

this act to the Lord Ordinary to imprison the offender.

It does not appear when the practice of granting warrants for imprisoning members of the court, for detaining papers, began; but it seems to be necessary for preserving the authority of the court. The first time such warrants are mentioned in the printed acts of federunt, is in Nov. 1691; but A. S. 11th Nov. 1691 from the recital of that act, the practice of granting warrants seems to have been established before that time.

The detention of papers in processes seems to have been the subject of constant complaint. Sir Robert Spottiswoode, President of the Session, in a speech made to the advocates in 1633, complains much of it, and threatens to put the statutes made against it in execution; but does not mention what these statutes were. There A. S. 29th Jan. 1640. are also many acts of federunt 10th Jan. 1643. made since that time, for preventing this evil practice; to most of 15th Dec. 1643. and 21st Nov. 1649. which, penalties, by way of fine, are

are annexed. These acts appear not to have been effectual; but since warrants for imprisoning the person who detains the process have been introduced, the practice of detaining papers has, in a great measure, ceased.

A. S. 11th
Nov. 1691

The party against whom the warrant is granted, is obliged to satisfy the maker who executes the warrant, for his trouble.

If a summons shall not be called within year and day of the last day of compearance, the action will fall of course, and no proceedings can be had in that summons: but if the defender shall not chuse to lie under the uncertainty of attendance, after the days of compearance are elapsed, he may put up a protestation in the minute-book for not insisting; and if the pursuer shall suffer the protestation to be extracted, the process shall be at an end; though it is competent to the pursuer to raise a new process upon the same grounds.

A

A calling by the clerk will stop the extracting of this protestation: but it may be renewed for not in-rolling; and such new protestation will have the same effect as the former, if the cause is not in-rolled in due time.

To prevent undue preference of one cause to another, books of in-rolment are ordered to be kept, both for the inner and outer house, in which all causes must be inrolled; and the judges are ordered to proceed according to the order of such inrolment.

Act reg.
1672. § 2.
5. 6. & 7.

Two of these books are appointed for the outer house; in one of which is contained the roll of suspensions, advocations, removings, ejections, and recent spuilzies. This generally passes under the name of the *suspension-roll*, and is called upon Tuesday and Wednesday.

Ibid.

By the present practice, removings, ejections, and recent spuilzies, are inrolled in the ordinary action roll.

The

The other book contains the roll of the outer-house causes. This roll is called the *ordinary action roll*. In the first part of this roll are placed summonses where no compearance is made for the defender, and processes upon warrant for discussing reasons of reduction. These causes are commonly called upon Wednesday, immediately after the suspension-roll is finished. This part of the roll goes under the name of the *regulation-roll*, being appointed by the acts of regulation.

Act reg.
1672.
§ 11.

Act reg.
1695.
§ 21.

The keeper of these rolls is ordered to attend in the session-house each Saturday afternoon during the session, to receive the notes of inrolments, and to mark the date of the inrolment on the process; which must be ingrossed in the book according to the date of the return, by the defender's advocate. It is also his duty to affix on the wall of the outer house, each Monday, a roll of causes, according to the order of the book, which are to be heard that week.

Act reg.
1672. § 2.
and 3.

The

The keeper of the rolls is also ordered to attend to inrol causes the last Saturday of the Christmas vacance. A. S. 24th Dec. 1763

The method of inrolling is, by giving a note to the keeper of the rolls for the outer house, who marks the date of the inrolment on the summons, and inrolls the cause in the book.

Process at the instance of ministers for payment of their stipend, process of wrongous imprisonment, and process against inferior judges, who neglect to put in execution the laws made for preservation of the fishing, are intituled to summary dispatch, without abiding the course of the roll. W. p. 1. c. 27. Act 1701. c. 6. Act 1705. c. 2.

The rolls of ordinary actions, and of suspensions in the outer house, are ordered not to be called upon the last nine federunt-days of the winter-session, and last seven federunt-days of the summer-session; but the regulation-roll and acts are allowed to be called during all these days. A. S. 16th Feb. 1723 § 3. Vide Acts of linifcon- testation.

CHAP.

C H A P. II.

Ordinary Process before the Lord Ordinary in the outer house.

S E C T. I.

Proceedings before an interlocutor is pronounced.

A & reg.
1672.
§ 10.

A S. 20th
Dec. 1690

WHen a process is called before the Lord Ordinary in the outer house, if the pursuer is not ready to insist, the process shall be deleted out of the roll, and not continued to the next week's roll; but if the defender demand it, he is intitled to a protestation: the effect of which is, that the defender shall not be obliged to answer without a new summons, and receiving payment of the protestation-money; which is usually modified to 10 s. Sterling.

Though the act of parliament is peremptory, this protestation is usually recalled upon application by

by the party to the Lord Ordinary, before the extracting of the protestation; but the defender is intitled to insist for payment of 10 s. before the pursuer can be heard. A. S 20th
Nov. 1711
§ 5.

If the defender is absent when the cause is called in the course of the roll, the pursuer is intitled to proceed in the cause, and to get decret, in case his libel is proved; but if a proof is required, a term will be assigned for proving the libel; and the defender ought not to be reponed against that sentence or interlocutor, but upon payment of 20 s. to the pursuer. Ibid.

These penalties are seldom inflicted, which occasions many delays to the parties.

If the advocate for either party be in the inner house when the cause is called before the Lord Ordinary in the outer house, the Lord Ordinary shall call the cause next day, if desired by a note from either party. Act reg.
1672.
§ 10.

Decreets in absence of the defender, pass of course when demanded;

E

manded;

manded; and it is usual, in making out the extracts of such decreets *, when the defender has been personally cited, to recite, that the pursuer had referred the verity of the libel, in so far as not proved by the writings produced, to the defender's oath, and that the defender having failed to appear, was held as confessed. Tho' this is only the manœuvre of the extractor, without any warrant in the proceedings to authorise it, the decret shall be held good until it is suspended or reduced. But when a reference to the defender's oath is really intended, such reference should regularly be ingrossed in the minutes; and the interlocutor should bear, that the defender was held as confessed, in respect of his not appearing.

Upon this head, it may not be improper to observe, that if a party is held as confessed upon any point

* Extract of a decret is an authenticated copy of the proceedings and decree, made out in a particular form by an extractor, and signed by one of the principal clerks.

referred

referred to his oath, and circumduction is granted after appearance has been made, and a day taken by an advocate for him to depone; in case of the death of such party before he is reponed, the circumduction shall stand good without remedy. It therefore becometh advocates to be very certain of their authority, before they enter such appearance. This caution is thought necessary, because at present such an appearance is held to be a matter of mere form, and consequently very little attention is given to it.

It is a common device of defenders who want delay, to suffer decreets to pass in absence against them, and then to offer a representation to the Lord Ordinary, praying to be heard on their defences. By this shift, the determination of causes is greatly postponed, and much unnecessary trouble is given to the Lord Ordinary, in reading representations, which contain nothing material in the cause. This inconvenience

would probably be in a great meaſure remedied, if all representations againſt decreets in abſence were diſcharged, (excepting againſt ſuch decreets as may happen to be pronounced upon the laſt ten days of a ſeſſion, where representations may be neceſſary to prevent extracting the decret); without prejudice to the defender, either to apply for redreſs to the Lords in the inner houſe by petition, or, upon a warrant to be obtained from the clerk in the proceſs, to inroll the cauſe in the next week's regulation-roll for a hearing. And it would make this rule more effectual, if the clerk were ordered not to grant ſuch warrants for inrolment, unleſs the defender ſhall previously lodge in the clerk's hands all his defences, both dilatory and peremptory, and ſhall conſign a certain ſum in name of damages, to be delivered to the purſuer's agent, upon receipt, when demanded, without fee or reward, and without the neceſſity of an application to the
court

court for a warrant. And the like regulation may be made with respect to the consignation of the sum for the pursuer's damage, in case a defender shall offer a suspension, or raise a reduction of a decree in absence.

If this should be made a rule, it would be necessary, when there are more defenders than one in a process, that each defender should be named in the roll for the outer house; that parties agents may have proper notice to attend to the defence of their clients.

When both parties are ready, the pursuer's advocate proceeds to recite his libel, and the vouchers of it; and the defender proceeds next to open his exceptions to the libel in their proper order.

These exceptions may be either dilatory or peremptory.

Under the first of these heads are comprehended,

1. Exceptions to the competency of the jurisdiction of the court.
2. Personal exceptions to the judge.

These two are properly declinatory defences.

3. Exceptions to the form of citation or execution.

4. Exceptions to the pursuer's title to carry on the action.

5. Exceptions to the form and competency of the action.

6. Exceptions to the proceeding, because all parties having interest are not called.

7. Exceptions personal to the defender, *viz.* That he does not represent the person who was the original debtor to the pursuer.

A. S. 1st
July 1729 These, and other dilatory defences, should be discussed before proceeding to the peremptory exceptions; because if the defender shall proceed to plead his peremptory defences, he will be understood to have passed from his dilatory defences.

A defence is said to be peremptory, when it is such, as the decision thereof shall put an end to the cause.

By an act of federunt in 1711, it is ordained, that all dilatory defences

defences shall be proponed at one time; and these being discussed, all peremptory defences, or other allegations, shall be proponed at least before any application to the Lords in presence; with certification, that no new allegation or defence shall be heard, unless it be come recently to the proposer's knowledge or observation; in which case, the proposer is to pay a fine to the other party for his expence, to be modified as there shall be cause: and in all cases where it is pretended that an allegation is but recently come to observation, the same shall be instructed by oath, and no otherwise.

A. S. 20th
Nov. 1711
§ 16.

When an allegation is offered to be instructed *scripto*, if either the pursuer or defender is possessed of the writings by which he means to prove his allegation, and shall not produce them immediately, or shall suffer a term to be assigned, or a diligence to be granted for recovering writings in his own custody, the person having such writings

Ibid. § 17.

tings shall pay a fine to the other party, to be modified by the judges, not under 40 s.

A. S. 20th
Nov. 1711
§ 5. & 6.

By the same act it is ordered, that advocates be ready to debate at the first calling of the cause; and that all writings in the hands of either party, not formerly produced, shall be lodged in the clerk's hands twenty-four hours at least before any cause shall be called, either in the outer or inner house; and the particular clauses of the said writings upon which parties intend to found any allegation, shall be marked; and the clerks are ordered to give up no writings, but upon receipt, and to recall all such writings as have been given up, by caption, if necessary, before a process is called.

By this act it is also ordained, that either party who shall detain such writings, shall be fined in 15 s. Sterling at least.

At the calling of the cause in the course of the roll, if the dilatory defences are over-ruled, the defender

defender shall immediately thereafter, at the same hearing, repeat his peremptory defences before the Lord Ordinary; and shall, without delay, give in the instructions of these defences, in so far as they are to be proven by writings in the defender's hands.

A. S. 1st
July 1729.

If the cause shall be fully heard at the first calling, and facts all settled, the Lord Ordinary will either give judgement; or, in case of difficulty, will report the matter to the Lords: but if the process shall not be then ripe for a decision, his Lordship will again hear the cause at the side-bar.

For ascertaining the time of these side-bar hearings, the keeper of the outer-house roll is ordered to affix on the wall of the outer house, each Monday morning, a note of the particular days, hours, and names of the Lords, who are respectively to be Ordinaries at the side-bar for that week; and the rolls of causes to be called by each Ordinary respectively, are appointed to be made up and signed

A. S. 11th
Nov. 1708

ed by his own clerk, and affixed on the wall the night before the roll is to be called; in which roll the number of cauſes is to be ſpecified, and no addition ſhall be made to the roll.

A. S. 23d
Nov. 1752

The time for putting up this roll is now fixed to be twelve o'clock in the day preceding the calling of it.

This notice to parties is too late; becauſe, in the common courſe of buſineſs, it is almoſt impoſſible to get matters properly prepared for the hearing: it were therefore to be wiſhed, that the time of notice were enlarged, and that the hand-rolls were ordered to be put up forty-five hours at leaſt before the calling.

The due execution of the ſeveral acts relative to the giving in and proponing defences, would greatly tend to the ſhortening of proceſſes, and would in a great meaſure render the after hearings at ſide-bars unneceſſary. This ſeems to have been the opinion of the commiſſioners who formed the regulations

regulations in 1695; by which all Act reg. 1695. § 13. side-bar hearings are discharged, and in lieu thereof, the Lord Ordinary is ordered to call the causes he has not finished the preceding days of that week, on Saturday betwixt ten and twelve, at the fore bar.

But although this excellent statute was complied with, in so far A. S. 11th Nov. 1708 as it ordained the causes not finished on the preceding days of the week, to be called on Saturday; the hearings at the side-bar were still continued, and new rules were made concerning the order of calling such causes.

These rules were afterwards altered by a subsequent act, which A. S. 16th June 1733 ordains, that the court shall not sit till ten o'clock in the morning; and that three Ordinaries shall sit each federunt-day betwixt nine and ten in the morning, at three different bars, for discussing their hand-rolls.

This act was at first temporary, A. S. 5th June 1734 but was afterwards made perpetual.

Side-

A. S. 16th

Feb. 1723.

§ 3.

6th June

1733.

Side-bar rolls are not allowed to be called during the last four days of the winter-session, and last two days of the summer-session.

These several regulations of the side-bar hours, have not answered the end proposed by them. The multiplicity of causes called at different bars at one time, creates great confusion, and is often the occasion of delay; for it frequently happens, that the same advocate and clerk are called to two different bars at the same time.

Upon this head, it may not be improper to observe, that quick dispatch in all processes, in a great measure, depends upon the regularity of the proceedings in the beginning: it were therefore to be wished, that the several acts relating to the returning and proposing defences, were duly observed, and that all causes were fully heard by the Lord Ordinary at the first calling in the outer house. A judgement would then be obtained at first hearing, if the matter in dispute be clear; and, in case of difficulty,

difficulty, if, instead of a minute, which is often difficult to be settled by the parties, each party were ordered to give in a full memorial of his case, both of fact and law; and if from these an accurate state of the facts founded on by each party were made out, the Lord Ordinary would then have a full view of the cause, so as either to give his own judgement, or to report the case to the Lords. This method would also be attended with another convenience, that in all the after proceedings, reference would be had to the state of facts, whenever a dispute should happen relative to them.

This state might be made out by the clerk's servant, for which he should have a fee allowed; and it might be in this form:

Class 1. Facts admitted by all parties.

Class 2. Facts vouched by writing, distinguishing by whom the allegation is made, and referring

F

to

to the particular clause by which each fact is vouched.

Class 3. Facts alledged by the pursuer, and denied by the defender.

Class 4. Facts alledged by the defender, and denied by the pursuer.

In this state, reference should be made to the pages of the respective memorials and writings from whence it is taken.

When two or more processes are anywise connected, the process first inrolled is held to be the leading process; and the Lord Ordinary, at calling the subsequent processes, will remit them to it *ob contingentiam*.

Processes remitted in this manner remain distinct processes, tho' depending before the same Ordinary, unless they are also conjoined; and therefore a proceeding in one of them shall not prevent the other from sleeping.

All interlocutors and sentences must be signed by the judge; and by an act of federunt, interlocutors

tors in absence are ordered to be signed by the Lord Ordinary the same day they are pronounced; and interlocutors upon debate, to be signed within six days thereafter at farthest. A. S. 9th July 1709.

Interlocutors pronounced on the four days preceding the two last days of a session, must be signed within forty-eight hours of their being pronounced; and interlocutors pronounced the two last days of a session, must be signed the same day they are pronounced. Ibid.

No interlocutor can be signed after the rising of the session. Ibid.

When interlocutors are not signed of the true date they are pronounced, the clerk is ordered to prefix to the minute the true date of the debate, and of pronouncing the interlocutor, and below the interlocutor to add the date of signing it. Ibid.

Interlocutors not signed according to the rules prescribed by this act, are declared to be void and null. Ibid.

S E C T. II.

Of representations to the Lord Ordinary.

THE party who is dissatisfied with an interlocutor, must offer a representation to the Lord Ordinary, praying an alteration of the judgement, within ten federunt-days of the signing of the interlocutor; otherwise the interlocutor shall become final, unless the party shall alledge he has come to the knowledge of some new fact, which he did not know before; and which allegation must be proved.

A. S. 16th
Feb. 1723.
§ 2.

In reckoning the federunt-days in the outer house, Saturday is included; in petitions to the inner house, it is excluded. *Vide* Petitions, chap. 3. § 2.

Representations against decreets entirely in absence, may be presented at any time before extracting the decret.

Anciently,

Anciently, the Lords used to stop the extracting of decreets by a verbal order: these verbal stops were afterwards discharged, and stops were ordered to be in writing, and to be subjoined to representations. Such stops are also declared not to endure above a fortnight, if granted in time of session, and to endure only until the first eight days of next session are elapsed, if granted in time of vacance, unless they are renewed.

The signing of interlocutors in time of vacance being now discharged, the last part of this act has become usefess, and the clause limiting the endurance of stops has become obsolete.

The Lord Ordinary, after reading the representation, will either refuse the desire thereof, or ordain the same to be answered by the other party; either of which shall keep the matter open until a new interlocutor is pronounced.

Every new interlocutor creates a fresh delay, as it is competent to the party who thinks himself

injured, to offer a new representation within ten days of the last interlocutor; and there being no limitation as to the number of representations, the occasions of delay are infinite, when parties are litigious.

If parties were fully heard at first, representations to the Lord Ordinary would be unnecessary, unless something new should be discovered, which they did not know at the time. This was the opinion of the court at making the act of federunt in 1756, concerning proceſſes of ranking and sale; by which all representations are discharged. But if representations to Ordinaries shall be thought necessary, the number of them may be limited; and the order for answering may also be fixed to a peremptory day, under a penalty, to be paid to the party who suffers by the delay. This would secure dispatch, and, at the same time, parties would very seldom suffer any loss by it. For when, by the strict observance of form, a party shall

A. S. 17th

Jan. 1756.

§ 10.

Vide

Act reg.

1672. § 15

shall be excluded from obtaining material justice, the judges will, no doubt, give a remedy: but such remedies should very seldom be applied, and only in cases of absolute necessity; because the loss to the public, by the bad example, will much overbalance the benefit which a few particulars may receive from the indulgence; and in every case of necessity, where the form shall be dispensed with, the party who suffers by the delay should be indemnified.

If the Lord Ordinary, after repeated representations, shall continue to adhere to his former interlocutor, the party who complains must either acquiesce, or apply to the Lords in the inner house by petition.

When a representation against a
 decree pronounced by an Ordinary
 is refused, the decree formerly
 pronounced must again be put in
 the minute-book; and the decree
 cannot be extracted until the elapse
 of three days after the last inter-
 locutor

A. S. 6th
 Feb. 1748.

locutor has been put in the minute-book.

S E C T. III.

Of incident Diligence, and acts of Litiscontestation.

WHen parties are not possessed of the necessary writings for proving either the libel, or defences; upon their application, the Lord Ordinary will grant letters of incident diligence against havers *; and if the person who has the writings, shall not produce them within the time limited, after the diligence is executed against him, upon reporting the first execution a second diligence will be granted; the effect of which is, to

* An incident diligence is a writ in the King's name, and under his signet, containing warrant for citing parties and witnesses, and also the holders of writings, to appear in court, and to give evidence of facts, or produce all writings called for, respectively.

The second diligence contains a warrant for taking them into custody, for their contempt of the first order.

take

take the person who has the writings into custody, until he shall deliver them.

When parties do not agree as to the truth of the several allegations made by them, it is competent to either party to insist, that the party who does not admit the facts alledged, shall confess or deny the truth thereof; and if he shall refuse to answer, he shall be held as confessed; but if he shall deny a fact which is afterwards proved to have been known by him, such party shall be obliged to pay all the expences, without any modification, which the other party has been put to by his calumnious denial.

A. S. 1st
Feb. 1715
§ 6.

When parties persist in denying the facts, the Lord Ordinary will grant warrant for proving their several allegations; and if this warrant is general, it is called *an act of litiscontestation*, which is extracted and signed by the clerk; after which, the Lord Ordinary can proceed no further in the cause without a warrant from the Lords.

By the ancient practice, the relevancy

levancy was, for the most part, determined before pronouncing the act; but now acts are generally allowed before answer as to the relevancy, and parties are allowed, not only to prove the facts contained in their mutual condescendences and answers, but also all other facts and circumstances relative to the cause.

Before extracting an act, either party may pray a review of the interlocutor, by presenting a representation to the Lord Ordinary within ten days, as before mentioned.

J. VII.
p. 1. sess. 2.
c. 10.

If the pursuer shall offer to prove his libel, or allegations, by the defender's oath, he must furnish him with an extracted act within forty-eight hours after being required thereto, otherwise the defender shall be dismissed.

Ibid.

When the defenders in exhibitions shall depone negatively, and defenders in forthcomings shall depone, whether *negativè* or *affirmative*, the clerks and macers fees shall be paid by the pursuers.

This

This act is also extended to processes before inferior judges.

Sometimes, to avoid the expence of extracting an act, the Lord Ordinary grants warrant for the proof to be taken upon an incident diligence, to be reported to himself; and, in such cases, the process shall continue before the same Ordinary, and the proceedings shall go on in the same manner, as in causes where no proof is necessary.

The Lords used formerly to examine witnesses themselves, but for some years past they have done it by commission.

If the commission for the examination is granted to the clerk, or his servant, and is to be executed during the sitting of the session, it may be done by a written warrant upon the process, without extracting the commission: but when the commission is granted to some other person, it must be extracted, and a diligence granted for citing the witnesses to compare before the commissioner.

No

No witness can be examined, unless he is previously cited by a diligence to give his evidence.

Cha. II.
p. 1681.
c. 9.

If a witness is under diligence for debt, and is apprehensive of being taken into custody for it, if he should appear to give evidence, the court, upon a petition, may grant him a protection for a reasonable time, not exceeding one month, provided the party who requires his evidence, or his tutors or curators if he is a minor, shall give his oath of credulity, or subscribe a certificate under his hand upon oath, that the evidence of such witness is material in the cause.

J. VII.
Act 1686.
c. 18.

Parties, and their advocates, are intitled to be present at the examination of witnesses, and to see the depositions in the clerk's hands, and get a copy thereof, before advising.

The term assigned for proving being elapsed, the act must be called before the Lord Ordinary in the outer house for the time; who, at the suit of either party, will

will circumduce the term against the other party for not proving; and, at the same time, make great avifandum with the proof adduced.

Against this interlocutor, no defence can be offered to the Lord Ordinary, his Lordship having no power to judge of the merits of the case; but if witnesses shall have been cited who have not appeared, upon reporting the execution of the diligence, the Ordinary will delay the granting circumduction, and will grant a second diligence against the witnesses formerly cited.

After the term of the second diligence is elapsed, the party may again get his act called, and will then obtain circumduction, and avifandum with the proof; which concludes the proceedings in the outer house.

After an act is extracted, and the term for proving is elapsed, the term shall not be prorogated, but upon weighty reasons and unforeseen accidents, sufficiently verified;

A. S. in
Feb. 1715
§ 8.

rified; and the party who asks the prorogation shall, before getting the benefit thereof, pay to the other party the damage and expence occasioned by such prorogation, as modified by the court.

The application for a prorogation must be made by petition to the Lords in the inner house.

The acts are called on Wednesday and Friday at ten o'clock before the Lord Ordinary in the outer house; and previous notice is given to the parties, by the clerk's affixing a note of the acts to be called, on the wall of the outer house, the day preceding.

When the proof is taken in consequence of a diligence, to be reported to the Lord Ordinary, the cause may be inrolled in his Lordship's hand-roll for advising the proof. In this case, it is regular also to circumduce the term; and if the proof is clear, the Ordinary may advise it immediately; but if there is difficulty, he will make *avisandum* with it to himself: and the cause shall then remain with his

his Lordship until he shall determine it, in the same manner as in cases where there is no proof taken.

After a cause has been once Act reg. heard by the Lord Ordinary, it ^{1672.} shall remain before him until it ^{§ 14.} be discussed, either by an act of litiscontestation, protestation, or decret; and if the Ordinary shall die during the dependence, all proceedings shall stop, until a new Ordinary shall be named by the Lords. *Vide* Petitions, chap. 3. § 2.

C H A P. III.

Proceedings before the Lords in the inner house.

THE Lords are ordered to advise all causes with open W. & M. p. 1. sess. 5 c. 27. doors, some special cases excepted, at the discretion of the judges.

The form of bringing causes from the outer to the inner house is various, according to the nature and circumstances of the case; and

may be comprehended under the three following heads.

1. Report by the Lord Ordinary.
2. Petition by any one of the parties.
3. Great avifandum made by the Lord Ordinary.

S E C T. I.

Of Reports.

THE form of reporting causes by the Lord Ordinary in the outer house, has undergone many alterations not necessary here to be mentioned, it being now finally settled by an act of federunt; which ordains, “ That when a Lord Ordinary shall take a cause or point to report, he shall appoint a day for the parties to put their informations into the Lords boxes * : That if one of “ the

A. S. 29th
June 1733

* To avoid solicitation, the judges receive no petitions, informations, or other papers, from the suit-
ors

“ the parties shall be ready, and
“ the other shall not be ready, at
“ the time appointed, the Lord
“ Ordinary shall, in that case, au-
“ thorise the party whose infor-
“ mation is ready, to print the
“ minutes of debate, and shall
“ find and declare the other party
“ liable to repay to him the ex-
“ pence of printing the same; and
“ shall appoint a new day for put-
“ ting the said minutes, when
“ printed, with the information
“ of the party who had prepared
“ the same, into the boxes; and
“ shall declare, that no informa-
“ tion shall be received for the
“ party who has been found dila-
“ tory, without payment to the
“ other party of an amand, such
“ as the Lord Ordinary shall find
“ reasonable, and fuitable to the
“ party's contempt, not under the
“ sum of 40 s. Sterling.”

ors or their agents; but each Lord has a locked box, with a slit in it, placed in the outer court, where printed copies of all such papers offered to the court are put in.

A.S. 5th
June 1739
& 13th Ju-
ly 1739.

This regulation was afterwards renewed in 1739, and an order made, that as soon as the clerk shall intimate to the Lord Ordinary, that the process and printed informations of the parties are in his hands, the Lord Ordinary shall grant warrant for inrolling the cause; and in case one of the parties is not ready, upon production of the party's information, and of the copy of the minutes both printed, the like warrant shall be granted, and the Lord Ordinary shall award such summar compul-
fator for payment of the expence of printing the minutes, and of the amand if incurred, as may be awarded for expences of witnesses, or other incidental expences of process.

A.S. 19th
Dec. 1710

Informations must have the name of an advocate subjoined to them; and should contain nothing but what is relative to the points contained in the minute of debate before the Lord Ordinary; and therefore, in all reports, the minutes of debate ought to be accurately

rately made up by the clerk, at the sight of the parties.

S E C T. II.

Of Petitions and Answers.

PETITIONS against interlocutors of an Ordinary, must be presented within eight federunt-days after subscribing the interlocutor complained of; and shall not contain any new allegation in law or fact, not insisted on before the Lord Ordinary; without prejudice to parties to suggest new arguments upon the allegations offered to the Ordinary.

In reckoning the federunt-days for petitions, Saturday is excluded, excepting the five last federunt-days of the session.

No petition against an act or decreet passed in the outer house shall be presented to the inner house, until the party shall first apply to the Lord Ordinary in the cause by representation.

This

This regulation seems to comprehend only such petitions as contain new matter not laid before the Lord Ordinary.

A. S. 26th
Nov. 1718

No more than one petition shall be offered, reclaiming against an interlocutor in presence.

A. S. 1st
Feb. 1715.
§ 4.

One petition only is also allowed against an interlocutor of an Ordinary's condemning in, or affoiz-
ing from expences. But it is not competent to reclaim against such interlocutor when pronounced by the Lords in presence.

A. S. 22d
July 1743.

When an incidental diligence is granted by an interlocutor of the Lords in presence, and an application for a further diligence, or avifandum with the proof, is necessary, such application shall be made by petition to the Lords.

If an Ordinary shall die during the dependence of a process before him, either party may apply by petition to have a new Ordinary named by the court.

Incidental petitions which do not complain of an interlocutor, must be notified to the parties having

ving interest, or to their known advocate or agent in the process, personally, twenty-two hours at least before such petition shall be moved to the Lords, by delivering a full copy of the petition, with a note indorsed thereon, expressing the time when the petition is to be moved, which is to be indorsed on the principal petition, and signed by the person who intimated it; and a copy of the same note, but not subscribed, shall be put upon the printed petition given in to the Lords boxes; and the person who intimates the petition, is ordered to attend at the bar at advising, that he may verify his having given such notice by his own oath, and by the oaths of credible witnesses, if it shall be found necessary.

A. S. 20th
Nov. 1740

By this act, in case the agent or advocate to whom the petition is intimated, shall deny that he is for the party interested, such denial shall be mentioned in the intimation; and the party who intimated the same shall be ready, at

at the time of moving the petition, to verify, that the advocate or agent to whom notice is given, is for the party interested, otherwise ſuch notice ſhall not be held as legal.

Petitions which, by their nature, require ſecrecy, or ſuch diſpatch as cannot admit of giving ſuch notice, are excepted from this act.

A. S. 15th
Jan. 1741. This act was afterwards confirmed, and a penalty of L. 3 Scots annexed to the tranſgreſſing of it.

And the order for perſons who ſhall intimate incidental petitions to attend at the bar when the petition ſhall be moved, was again renewed, under a penalty of 5 s. Sterling.

A. S. 19th
Dec. 1739 When petitions or answers are given in to the boxes, the proceſs, and alſo the inſtructions of ſingle bills which do not refer to proceſs, muſt be given in to the clerk at four o'clock in the afternoon of that ſame day, at fartheſt, under the penalty of 40 s. Sterling.

Interlocutors

Interlocutors on petitions shall be intimated, by inserting the deliverance in a book; from which the depute-clerks shall, *per vices*, make out a roll, every day, of such deliverances; and shall cause the roll to be put on the wall of the outer and inner house, with a note subjoined, expressing in what office the book lies: and the book is ordained to be patent to all concerned, without fee or reward.

A.S. 10th
Feb. 1739

That parties may have notice when their petitions, answers, and reports, are to be advised by the court, the keeper of the inner-house rolls is ordered to keep a book, and to inroll such causes in the order they shall be presented by the parties, and also to mark the date of inrolling on the margin.

A.S. 13th
July 1739.
§ 2. & 3.

By the same act, another book is ordered to be kept, wherein are to be inrolled all causes that shall, upon report, or petitions and answers, be appointed by the Lords to be heard in presence, in the order, and according to the date of the

Ibid. § 4.5.

the interlocutor appointing the hearing.

Ibid.

Inspection of these books is allowed without fee or reward; and the roll of the causes, according to the order of the book, is ordered to be put up from time to time on the wall of the inner house.

From these two rolls, the Lords make out a short roll of causes to be advised *immediately*.

A. S. 29th
July 1747.

Petitions against interlocutors in presence, and answers thereto, are intitled to the short roll, without abiding the course of the long roll.

The time for answering petitions is generally limited by the interlocutor, and a penalty is usually annexed to the contravention of the order.

A. S. 16th
Dec. 1760

All papers to be put into the Lords boxes must be put in before twelve o'clock, each session-day.

All papers to be advised on Tuesday, must be put in the boxes on Saturday before twelve at noon.

A. S. 10th
Mar. 1762

Petitions and answers must all be signed by an advocate, or by the party.

The

Ch. III. § 2. *Pet. and Answers.* 85

The clerks are intituled to a fee Act reg. 1695. § 2. of 58 s. Scots for each petition or answer given in to the court; the receipt of which must be marked by the clerk's collector upon the petition or answer, before it is presented.

Additional petitions, answers, A. S. 10th Nov. 1741 informations, memorials, or other writings, not given into the boxes before inrolment, are discharged to be given in after eight running days from the date of the inrolment, unless by special appointment of the court, under the penalty of 40 s. Sterl. to the poor.

If additional answers, replies, or memorials, shall be thought necessary, after the time limited by the said act is expired, a petition must be given in to the court for that effect.

When an answer, or any other paper, is not ready to be given in against the day assigned, the court will prorogate the time, upon a motion made by a note given into the Lord President's box; and a A. S. 29th Jan. 1767 copy of such note must also be gi-

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ven

ven in to the box of the clerk to the process; and the process itself must be returned to him, if borrowed upon receipt.

Order of Petitions for sequestrations, or
court, 21st for money, shall not be received
Dec. 1765 upon any of the five federunt-days
immediately preceding the ad-
journalment of the court for Christ-
mas vacance, nor after the 25th

Ditto, 17th of July for the summer-session, or
July 1764 20th of February for the winter-
session.

Ditto, 27th The marking of the clerk upon
Feb. 1765 a petition presented upon the pe-
nult day of the session, or before,
shall not keep the reclaiming days
open until next session, unless such
petition shall be printed, and ei-
ther put into the Lords boxes, or
distributed amongst the Lords, the
same session in which it is marked.

S E C T. III.

Of Concluded Causes.

Act reg. 1672. § 6. **T**HE keeper of the rolls in the
inner house is ordered to keep
a book of inrolment of concluded
causes,

causes, whereof the probation is to be advised by the Lords, to be inrolled according to the date of the conclusion of the cause, as the same shall be presented by the clerk of the process.

This order not having answered the purpose intended, by a subsequent act it is ordered, That the Lords shall name an auditor weekly, for hearing parties on concluded causes, according to the order of the roll thereof; who shall make a report of the probation in writing, and shall mark the particular parts of the oaths or writs insisted on, for either party; which report shall lie a week in the clerk's hands before advising, to be patent to all concerned; and then to be advised by the Lords, who are ordered to advise such causes on Saturdays, and also on the afternoons of such other days as the Lords shall appoint.

If the oaths of parties are marked clear by the Lord Examiner, such proof shall be advised summarily,

H 2

marily,

W. & M.
p. 1. sess. 4.
c. 17.

Ibid.

marily, and the cauſe ſhall be in-
rolled in the ſummary-roll.

Act reg.
1695. § 22

This was afterwards extended
to proofs by writs or witneſſes.

A. S. 1ſt
Nov. 1693

The Lords are ordered to meet
weekly *per vices*, in the parliament-
houſe, in the afternoon, from three
o'clock to five, to hear parties on
concluded cauſes.

The report made of the proof is
called a *State of the proceſs*.

Act reg.
1695. § 19

The advocates for the parties
muſt either object to the Ordina-
ry's report at the time of prepa-
ring, or give in their objections
within fourteen days thereafter at
moſt; and the objections and an-
ſwers ſhall be conſidered by the
Lord Ordinary, and ſubjoined to
the report. In caſe parties ſhall
neglect to give in their objections,
they ſhall not be heard thereon at
the adviſing of the cauſe, until
they conſign an amand of five
dollars; and no objection ſhall be
made at adviſing, againſt the act,
but only againſt the report, as to
the points proven or not proven.

The

The clerks are intitled to a fee ^{Act reg.} of one, or two dollars at most, for ^{1696. § 7.} preparing the cause, to be modified by the Lord Ordinary. The payment of this fee must be vouched by the collector's receipt on the process before advising; and each party is bound to pay one half of it.

The form prescribed by these several acts being attended with much litigation and delay, the court, of late years, has allowed the proof to be stated at large; and to supply the want of an arrangement, parties are allowed to represent their case in memorials to the court. By this means, the preparing of causes has become entirely an operation of the clerk's servant, who makes up a state of the process and proof as it stands, without observing any order with respect to the points litigated. This state is signed by the Lord Ordinary for preparing causes, after being inrolled in the roll of causes to be prepared; and the cause is thereafter inrolled in the conclu-

ded cause roll; and parties procurators are heard on the proof when the cause comes to be advised.

The practice of giving in memorials, which generally contain the whole argument at large, gives an unnecessary trouble to the judges, in reading long arguments, which are again to be resumed at the pleading.

But if, instead of these long memorials, parties would give in a short state of the points to be pleaded, referring to the particular parts of the proof on which they are to found their argument, the cause would be very well understood, and the pleading would be much more effectual.

CHAP.

C H A P. IV.

Process Extraordinary.

Some processes cannot be advised by an Ordinary, but must be advised by the Lords in presence. These, with a few other processes, in which the proceedings partly differ from those of ordinary actions, shall be treated of under the head of *Process extraordinary*; beginning with those which are particularly mentioned in the acts of regulations, and are ordered to be inrolled in a book to be kept for that purpose by the keeper of the inner-house rolls, who is ordered to attend in the session-house each Saturday during the session, from two to three in the afternoon, for receiving such inrolments.

This roll is affixed on the wall of the inner house, weekly, on Monday, under the title of, *The ordinary*

ordinary action roll for the inner house.

The ordinary actions for the inner house, mentioned in the regulations 1672, are,

1. Reductions of heritable rights of lands and annualrents.

2. Declarators of rights of property.

3. Proving of tenors of writings destroyed or lost.

4. *Cessiones bonorum*.

5. Hearings ordered by the Lords in presence, upon report of an Ordinary.

Act reg
1695. §16

By the regulation 1695, causes appointed to be heard, may either be debated immediately, or inrolled as before mentioned: But if a certain day is appointed for the hearing, the cause shall be peremptorily called that day; and a roll of such causes is ordered to be made for that purpose.

Ibid. §15.

This regulation is not now in use; and causes to be heard by special appointment, are subjoined to the short roll for the inner house by a note, mentioning the particular

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particular day the cause is to be heard. *Vide* Act of federunt, 13th July 1739, § 4. & 5.

S E C T. I.

Of Process of Reduction.

DEcreets-arbitral, proceeding on ^{Act reg. 1695. § 25.} a subscribed submission, shall not be reduced at the instance of either of the parties submitters, unless upon the head of corruption, bribery, or falsehood, to be alleged against the arbiters by whom the decret is pronounced; but if the arbiters shall exceed the powers granted to them by the submission, such decret may be reduced.

The preliminary steps of a process of reduction are the same with those of any other process.

If there is no compearance for the defender, the Lord Ordinary will grant decret of certification; but if the defender appear, and the pursuer's title is sustained, the
defender

defender must either produce the writings called for immediately, or a day will be assigned for production thereof; after the elapse of which, the pursuer may extract an act, and obtain a decreet of circumduction of the term.

When the writings called for are produced, the Lord Ordinary will make great avifandum to the Lords, and grant circumduction *quoad ultra*.

Act reg.

1672. § 5.

After this interlocutor, the Lord Ordinary can proceed no farther, and the cause should be inrolled in the ordinary action roll for the inner house, in case the reduction is of an heritable right or annual-rent; but in lieu of this, a new form has been introduced, by applying to the Lords by petition, praying a remit to the Lord Ordinary to discuss the reasons of reduction; which is granted of course; and the cause is remitted to the next week's Ordinary for the outer house, and is inrolled in the next week's regulation-roll.

If

If the petition is presented on Saturday, the cause is remitted to the Ordinary on the bills for next week, and shall not be called in the roll until the week thereafter.

Note. These remits seem to be unnecessary, and expressly contrary to the intention of the act of regulations 1672; and though they are intended for expedition, they often occasion great delay; for instead of having the relevancy determined, or an act before answer pronounced by the court at one hearing, parties, before obtaining their act for proving, are frequently obliged to run through the various proceedings of innumerable inrolments, representations, and answers, before the Lord Ordinary, and are sometimes forced to resort to the Lords in the inner house at last; whereas if the regulation 1672 were to take place, the additional trouble to the court would be very little; because all the writings founded on by either party are in the field; and the single question then to be tried by
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the court would be, the propriety of admitting a proof of the several allegations of the parties.

Reductions of decreets which do not concern heritable rights, are not comprehended under the regulations 1672; and yet, by the practice of the court, great avifandum is usually made with the writs produced, though no act is extracted; and the Lord Ordinary does not proceed to judge of the reasons of reduction without a remit from the Lords.

S E C T. II.

Of Process of Reduction and Improbation.

THOUGH in enumerating the processes proper for the inner house, the act of regulations 1672 does not mention a process of improbation; yet as it is always accompanied with a conclusion of reduction, and has a necessary connection

nection with that process, it falls next in order to be treated of; in doing which, we shall only mention the particulars wherein the form in carrying on this process differs from that of a simple reduction.

First, the summons of improbation must have the concurrence of his Majesty's Advocate, both to the bill, or warrant of the summons, and to the summons: neither of which is necessary in a simple reduction.

This is a matter of mere form. His Majesty's Advocate usually gives a commission to his clerk to sign these concurrences; and he is not thereby precluded from appearing for the defender.

Before the act of federunt 1723, A S. 16th Feb. 1723 § 3. the authors of the persons whose infestments were intended to be reduced, or their heirs in case they were dead, behoved to be called as defenders, both in processes of simple reduction, and reduction and improbation; but since that time, it has been only
I necessary

necessary to call the person whose infestment is intended to be reduced.

A&Ch.II.

3672.

c. 16. § 25.

When compearance is made for the defender in a process of reduction and improbation, two different terms must be assigned for the defender to produce the writings called for; upon each of which an act must be extracted: but in a simple reduction one term only is necessary.

A. S. 1st
June 1709

After extracting the act for the second term, before decret of certification is pronounced, judicial intimation must be made to the defender, to satisfy the production within ten days. This is done by a signed interlocutor of the Lord Ordinary upon calling the act.

Act reg.

1695.

§ 20.

When a summons of improbation is called in the course of the roll in the outer house, if there is no compearance for the defender, the Lord Ordinary shall appoint the summons to be again inrolled according to the date of its calling.

And

And if no compearance is made for the defender at the second calling, decret of certification may be pronounced immediately in absence: but in such case, the decret must remain unextracted for the space of four weeks at least, after it is signed by the Lord Ordinary.

The production of extracts from the records of an inferior court, of the writings called for, in a single reduction, is a relevant defence against certification; but when improbation is joined, the writing itself must be produced, unless it is recorded in the books of session or of chancery; in which case, a condescendence of the date of the record shall stop certification.

If the writings called for are recorded in the records of an inferior court, the Lord Ordinary will grant warrant for transmitting the principal writings to the process.

If the defender shall appear, and produce the writings in question, he must abide by the verity thereof under his hand; and if he do

not, the same shall be held to be forged.

Upon production of the writings called for, after the defender has abidden by the verity thereof, the Lord Ordinary will make great avifandum with the writs produced, and grant circumduction *quoad ultra*; after which he can proceed no further; and the cause must then be inrolled in the roll of ordinary actions for the inner house.

When there is no suspicion of forgery or falsehood, the Lords, upon a petition, will grant warrant to the Lord Ordinary in the outer house, to discuss the reasons as in a simple reduction; and in such cases, the proof may be taken by two Ordinaries. But in all cases of forgery and falsehood, the witnesses and parties must be examined by the Lords in presence, and the cause must be determined by the court.

If a forgery shall be proved, and the court shall be of opinion, that it merits a capital punishment, the Lords will remit the cause to the court

court of justiciary; but if a lesser punishment is intended, such as banishment, pillory, or whipping, &c. the court itself will inflict it.

S E C T. III.

Of Declarators of Rights of Property.

THIS process is now carried on in the same manner as other ordinary actions, notwithstanding the act of regulation 1672.

S E C T. IV.

Of Process of proving the Tenor.

THE preliminaries of this process are the same as in an ordinary action; but though it is inrolled before the Lord Ordinary in the outer house, he cannot judge in it; he can only make great avifandum to the Lords: after which, the process must be

inrolled in the roll of ordinary actions for the inner house, where it is advised by the Lords in presence.

In this process, the relevancy is generally determined before pronouncing the act allowing a proof.

When the term allowed in the act for taking the proof is expired, the cause must be inrolled in the ordinary action roll for the inner house; and the court, upon the application of parties, will make avifandum with the proof, and grant circumduction: after which, the form of proceeding is the same as in other concluded causes.

S E C T. V.

Of Process of Cessio bonorum.

THough this action is of the nature of a suspension, and is classed as such by Lord Stair; yet as it is properly an original action,

action, and is mentioned amongst the actions for the inner house in the regulations 1672, it falls next in order to be treated of here.

The summons proceeds upon a recital, that the pursuer is in prison, and unable to pay his debts; it is therefore necessary that the pursuer shall be in prison at the time of raising the summons.

The occasion and way how the pursuer came to be *lapsus bonis*, A. S. 1st Dec. 1685 must be specially libelled.

The summons in this process must be called by the clerks in the outer house as an ordinary summons, and must also be inrolled in the ordinary action roll for the outer house; and a roll of the names of all the creditors called must be affixed on the wall of the outer house. Ibid.

After the dilators in this process are discussed, great avifandum Aet reg. 1672. § 5. shall be made to the Lords; and the process shall then be inrolled in the ordinary action roll for the inner house.

The

A. S. 8th
Feb. 1688

The pursuer shall give in a disposition of his estate real and personal, in favour of his creditors; and shall make oath in the following terms: "That he hath no
" lands, heritages, sums of money, goods or gear, belonging
" to him, more than is contained
" in the disposition and inventory
" produced in process; and that
" since his imprisonment, he hath
" made no other disposition than
" that which is produced; and
" that he has made no other disposition before his imprisonment; and that since his imprisonment, he hath not put
" out of his hands any money, goods, or gear, belonging to
" him; and that he has not cancelled, or put out of his hands,
" any writs since his imprisonment."

A. S. 18th
July 1691.

If the pursuer shall acknowledge, that since his imprisonment he has cancelled or put away any writings out of his hands, he shall condescend on such writings in his oath; and he shall also condescend

A. S. 8th
Feb. 1688.

on

on any other disposition he may have made of his estate real or personal; and if he shall deny the making of such disposition, and that his oath shall be redargued, the decret of *bonorum* obtained by him shall be void and null, and he shall never get the benefit of a *Cessio bonorum* thereafter.

If it shall appear in the course of the process, that the pursuer has been guilty of fraud, he shall not obtain decret.

Bankrupts who obtain a decret of *Cessio bonorum*, shall constantly wear a particular habit, which is prescribed by the law. This is made an express condition of the decret; and in case the bankrupt shall be found at any time without the habit, his creditors may incarcerate him, and he shall forfeit all the privileges he is intitled to by the decret.

Stair's In.
l. 4. tit. 52
§ 34.

A. S. 26th
Feb. 1669
23d Jan.
1673.

18th July
1688.

This part of the form being extremely severe, the Lords, of late years, have generally dispensed with the habit in all cases where they have found

found the bankrupt intituled to a
decreet of *Cessio*.

S E C T. VI.

Of Process of Count and Reckoning.

THE preliminaries of this process are carried on in the same form as other ordinary actions in the outer house; with this difference, that this process should be inrolled in the regulation-roll, though by the practice, it is often inrolled in the ordinary action roll.

A. S. 22d
Nov. 1711
§ 1.

Ibid. § 2. At first calling before the Lord Ordinary, in case there is comparance for the defender, a day shall be assigned to him; before which, he shall give in to the clerk of the process a charge against himself, of the whole subjects to be accounted for; with certification, in case of his failing to obey this order, he shall be holden as confessed upon the charge to be given in by the pursuer, provided

vided that the pursuer gives his oath of calumny upon such charge.

The defender shall also give in with the charge, a copy of his discharge, with the vouchers in his possession; and in the said copy, shall condescend upon the articles instructed, and their vouchers, and shall also mark the articles not instructed.

The accounts, both charge and discharge, shall be signed by the defender or his procurator; and if any part of the charge shall be found to be fraudulently omitted, or concealed, the defender shall be decerned in the double of what shall be found to have been so omitted; without prejudice to the other party to add to the charge: and after giving in the accounts, the defender shall not be heard upon any new article of discharge, unless it shall be made appear, that such article had recently come to his knowledge; and in that case, if the defender shall be in fault, he shall pay a fine to the other party for his expence, occasioned

A. S. 22d
Nov. 1711
§ 3.

Ibid. § 2.3.

fioned by the delay, to be modified by the Lord Ordinary.

A. S. 22d
Nov. 1711
§ 4.

When the Lord Ordinary assigns a day to the defender to give in his accounts, he shall at the same time name the Lord who in course is to be Ordinary to the next count and reckoning, to be auditor thereof.

Note. The Lords officiate by turns in processes of count and reckoning, according to the order of their seats on the bench, beginning at the Lord who sits upon the Lord President's right hand.

Ibid. § 5.

After the accounts and instructions are produced, the Ordinary is authorised to appoint one or more advocates, or other proper persons of integrity, judgement, and experience, to consider the accounts and vouchers, to state the points in controversy, and to prepare and adjust the minutes, for the Ordinary to give his interlocutor upon the whole. These persons are also impowered to call parties and clerks before them, and are ordered to sign their report,

port, and to return the same to the clerk of the process; where it is ordained to lie for eight days, to be seen by all concerned without fee or reward; after which, no objection shall be received against the facts as stated in the report, but upon payment of 20 s. Sterling, or a larger fine, as the Ordinary shall please to appoint. The Lord Ordinary may renew the remit if necessary; and the person to whom the remit is made, is intitled to be paid for his trouble as his Lordship shall direct.

This act is also extended to all processes which do resolve into a count and reckoning, though such accounting is not libelled in the original summons.

Note, These causes are now usually remitted to accountants, who, by their profession, are best qualified for such employment.

It often happens, that by the anxiety of one party, and the repeated delays of the other, these remits are made before the accounts and vouchers are produced,

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which

which renders them quite ineffectual. The ſtrict obſervation of the firſt part of this act of ſederunt would effectually remedy this evil.

By the practice at preſent, upon giving in the report, the Lord Ordinary, at a calling, ordains all parties to ſee and object to it, againſt a time certain; and if no objections are given in within the time limited, the cauſe is again inrolled, and his Lordſhip approves of the report, and pronounces an interlocutor in terms thereof: but if objections are given in, they are ordained to be answered; and the proceedings in the cauſe thereafter are the ſame as in ordinary actions.

S E C T. VII.

Of Proceſs of Ranking and Sale of a bankrupt eſtate.

Ch. II.

p. 3. ch. 17

THis proceſs proceeds upon an act of parliament in 1681, whereby

“ whereby the Lords of Session
“ are impowered, upon a process
“ at the instance of any creditor
“ having a real right, to cognosce
“ and try the value of estates
“ where the heritor is notoriously
“ bankrupt, and the creditors in
“ possession of the estate, and to
“ value the same according to the
“ true worth thereof, in rents,
“ casualties, rights, and hold-
“ ings, according to the use and
“ custom of the country where the
“ lands lie; and to grant commis-
“ sion to persons to sell such lands
“ and estates, or any part thereof,
“ at the said rates, or more; with
“ consent of the debtor, where
“ there is a legal reversion compe-
“ tent to him; and without his
“ consent, where there is no legal
“ reversion; and that the price
“ which shall be got for the said
“ lands, shall be distributed by
“ the commissioners appointed to
“ sell the lands, or by the pur-
“ chaser, amongst the creditors,
“ proportionally according to their
“ several sums, rights, and dili-
“ gences,

“ gences, as they shall be ordered
 “ and found preferable by the
 “ Lords, whether the creditors
 “ have compeared or not.”

W. & M.

p. 1. sess. 2

c. 20.

This act was afterwards altered by an act in 1690; which declares, That the sale may proceed so soon as it shall be found, that the debtor is bankrupt, and utterly insolvent, whether the legal be expired or not; and that if no buyer be found at the rate determined by the Lords, it shall be lawful for them to divide the lands, and other rights, among the creditors, according to their several rights and diligences, and to determine the price and value of liferent-e-scheats affecting the lands.

The pursuer of this action must have a real right in the lands, and one of the creditors at least must be in possession thereof.

A. S. 23d

Nov. 1711

§ 1.

The debtor, and all his real creditors, who are in the known actual possession of his lands, by labouring, or uplifting rents, must be cited in the ordinary form of law; and the bankrupt's other creditors,

creditors, and all others having, or pretending to have, interest, must be cited by an edictal citation at the market-cross of Edinburgh, pier and shore of Leith, upon sixty and fifteen days for first and second diets; which edictal citation must also be executed *to the same day*, at the parish-church doors where the lands lie, after divine service, upon twenty-one and six days warning; and the execution of all these edictal citations must be recorded in a particular register, kept by the clerks of session for that purpose, before the last day of compearance, otherwise process shall not be sustained.

The summons must contain a warrant for citing the defenders in manner before mentioned.

Before the act of sederunt 17th A. S. 17th
 January 1756, it was necessary Jan. 1756.
 that a summons of sale should § 12.
 contain the particulars of all the heritable estate belonging to the bankrupt, and the omission of any one of them was fatal to the action; but by that act it is
 K 3 ordained,

ordained, That every summons of ranking and sale shall contain a general clause, mentioning all other lands and heritable estate belonging to the bankrupt, or to which he may succeed as heir to any of his predecessors; and that it shall be competent to the raiser, and carrier on of such process of ranking and sale, upon his discovering any heritable estate belonging to the bankrupt during the course of the ranking and sale, to bring a proof of the rental and value of such lands and other heritable estates so discovered, notwithstanding they were not specially libelled: providing always, That upon such discovery, and before granting warrant for a proof of the rental and value of the newly discovered estate, application shall be made to the Lord Ordinary in the ranking, and he shall give directions to give notice of the estates being discovered to belong to the bankrupt, and that the same is to be sold as part of the bankrupt's estate, by advertisement in the Edinburgh Evening-

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ning-Courant, weekly, for three weeks successively; and upon such notification's being reported to the Lord Ordinary in manner afore-said, he shall grant warrant for proving the rental and value of such new discovered estate, in the same manner as if it had been particularly libelled in the original summons of ranking and sale.

After the summons is called, A. S. 23d Nov. 1711 seen, and returned, it must be in-
rolled in the regulation-roll. § 6.

Note, Though by the act of sederunt 1711, as well as by the late act in 1756, summonses of ranking and sale ought to be inrolled in the regulation-roll, yet by the practice they are often inrolled in the ordinary action roll.

When a process of ranking and sale is called by course of the regulation-roll, the Lord Ordinary Ibid. § 6. A. S. 17th Jan. 1756 § 1. will pronounce an act in the sale, for proving the rental and value of the bankrupt's estates; and will grant diligence for recovering the bankrupt's writings; and assign a day for the creditors to produce
their

their rights and interests; and, *at the same time*, he must name the Lord who, in the course of the book, is next in order to be Ordinary to the ranking.

Note, Processes of ranking are appointed to go to the Lords by turns, according to the order observed in the processes of count and reckoning.

A.S. 17th
Jan. 1756.
§ 1.

By the act of 1756, the order to the creditors to produce their rights, is directed to be made with certification, as in a reduction and improbation; and the Lord Ordinary is authorised to ordain the interlocutor, assigning the first term for production, to be inserted in the Edinburgh Evening-Courant, once every week, for three weeks successively, immediately after the date of the interlocutor; and during the running of the said term, the Lord Ordinary may grant diligence against havers, upon application of any of the creditors.

Ibid. § 2.

Upon the elapse of the first term assigned for production, the process

cess must be called before the Lord Ordinary to the ranking; when he will appoint a time and place for a meeting of the creditors who shall have produced their rights, for chusing an agent for carrying on the process; and the person chosen by the majority of such creditors present at such meeting, or who shall have lawfully authorised one to vote for them, shall be approved of, and authorised by the Lord Ordinary.

Where the yearly rent of the estate under sale is L. 300 Sterling, A. S. 17th Jan. 1756. § 2. or upwards, such creditor only whose principal sums, exclusive of interest and penalties, unless accumulated by adjudication, amount to L. 50, is intitled to vote in the election of the common agent; but where the yearly rent of the estate is under L. 300, the qualification to vote is extended to every creditor whose principal sum amounts to L. 30 Sterling, exclusive of interest and penalties, as aforesaid.

The common agent, after his election, must immediately apply Ibid. § 3. to the Lord Ordinary; and, upon such

such application, his Lordship is directed by the said act, to assign a second term to the whole creditors of the bankrupt, to produce their claims against the bankrupt, or his estate, and the whole vouchers thereof; with certification, that such writs as shall not be produced shall be held as false and forged, in so far as they may affect the bankrupt's estate, and the interest of the creditors therein, who have, or shall produce their rights and diligences affecting the same. The Lord Ordinary is also directed to order notice to be given to all parties concerned, in the same manner as is appointed for the first term: which notification being reported to the Lord Ordinary, a minute is ordered to be made thereon; which is held as sufficient evidence of the notice against all parties concerned.

A.S. 17th
Jan. 1756
§ 6.

It is also ordained by the said act, that, at the same time that the first and second terms are assigned for production, the Lord Ordinary shall assign a term for the creditors

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tors to depone upon the verity of their respective debts; and shall grant commission to the judge-ordinary, or to any of his Majesty's justices of peace, for taking the respective creditors oaths, to be reported at the several diets appointed for production, in manner after written; with certification, that no creditor shall be ranked until he shall have made oath of the verity of his debt.

Upon elapsing of the second A. S. 17th term, the process shall be call-^{Jan. 1756}ed before the Lord Ordinary, § 4. who shall grant certification *contra non producta*, as in an improbation; but with this condition, that every production made within ten days after the date of the interlocutor, shall be received.

After these ten days are ex-^{Ibid. § 5.}pired, the common agent shall cause the decret of certification to be extracted; and such decret shall have the same force and effect in favour of the whole creditors whose interests shall have been produced in the process,

cess, so far as concerns the estate under sale, or price thereof, as if they had severally brought a process of reduction and improbation against the whole other creditors upon the bankrupt estate, and had thereupon obtained and extracted a decret of certification; without prejudice to the creditors who shall have neglected to produce their interests, to claim the bankrupt's share of the price, and to use diligence either against him or his other estate.

A. S. 17th
Jan. 1756
§ 7.

The production in the ranking being closed, " the Lord Ordinary shall assign a day to the " common agent, to make up a " state of the interests produced, " mentioning their rights and diligences, the sums claimed by " the respective creditors, the order of their respective preferences, with such objections as occur to him, either to the legality, or to the justice of the several claims, or to the extent of " their debts, or to their preferences,

“rences, notwithstanding the ap-
“parent priority of their security
“or diligence.”

“After the state of the claims A. S. 17th Jan. 1756
“is made up, and reported to the § 8.

“Lord Ordinary, his Lordship
“shall assign a day to the com-
“mon debtor, and to the credi-
“tors producing as aforesaid, to
“make such other objections to
“the interests produced, as they
“shall think proper, and to lodge
“them in writing with the clerk
“of the process against the day so
“assigned; with certification, that
“all objections that shall be omit-
“ted to be proponed, either by
“the common debtor, or by the
“common agent, or by the cre-
“ditors, against the day so assign-
“ed, shall be held to be passed from
“by all parties concerned; and it
“shall not be competent to them,
“or either of them, thereafter to
“propone the same in the course
“of the ranking, or in the divi-
“sion of the price of the bank-
“rupt's estate, unless such objec-

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“tions

“ tions shall arise from facts newly come to their knowledge.”

A. S. 17th

Jan. 1756

§ 9.

“ The objections being given in to the procefs in manner above directed, the Lord Ordinary shall assign a time to the creditors to whose claims the objections have been made, for giving in a full answer in writing to the objections made to their respective claims, and to lodge the same with the clerk; and upon their being so lodged, his Lordship shall appoint a further time to the objectors respectively to reply also in writing, and to lodge the same with the clerk.”

Ibid. § 10.

“ After the objections, answers, and replies, have been given in as aforesaid, the Lord Ordinary shall appoint a diet * for hearing parties thereon; and shall, with all convenient diligence, pronounce his interlocutor upon the said objections, answers, and replies, except with respect

* Day.

“ to

“ to such objections as his Lordship shall take to report.”

No representation shall be allowed against the Lord Ordinary's A. S. 17th Jan. 1756 § 10. determination of the said objections, but without prejudice to the parties to apply to the Lords by petition.

The Lord Ordinary shall not Ibid. § 11. make a report of any objections with which he has made a *avisandum* to the Lords, until the several objections determined by him shall be either acquiesced in by the parties, or stated to the Lords by petition; and that such petition shall either have been refused, or ordained to be answered: And when the whole objections remaining undetermined shall be stated to the Lords, they shall appoint a particular diet for advising the whole together, without abiding the course of the rolls.

If the pursuer shall die during A. S. 23rd Nov. 1716 § 4. the dependence, or shall forbear to insist in the process, or if his title and interest shall happen to be satisfied and extinguished, the factor, if there shall be any appointed

pointed by the court, or other-
 wiſe any other real creditor, may,
 upon *ſpecial warrant* from the
 Lords, carry on the proceſs for
 behoof of the whole creditors.
 And in order to obtain ſuch war-
 rant, it is neceſſary to apply to the
 court by petition.

A. S. 23d
 Nov. 1711
 § 5.

If the debtor, or any of the
 creditor's defenders, compearing,
 and producing their intereſts, ſhall
 happen to die during the depend-
 ence of the proceſs, the Lord Or-
 dinary will grant diligence for ci-
 ting the apparent heir of the debt-
 or, or of ſuch defender; and up-
 on reporting the execution of ſuch
 diligence, the proceſs ſhall be pro-
 ceeded in, without waiting the
 year of deliberation, or transfer-
 ring the proceſs *paſſive*.

Ibid. § 2.

By this act, the factor appoint-
 ed by the court upon the eſtate,
 is authoriſed to raiſe an adjudica-
 tion in the name of the whole
 creditors, according to certain di-
 rections in the act; but as this is
 ſeldom practiſed, it is unneceſſary
 to recite the clauſes here.

The

The process of ranking of the ^{Act reg.} creditors must be concluded, and ^{1695. § 26} the decret extracted, before the lands can be exposed to sale.

After the ranking is finished, and the proof of the rent and value of the estate under sale is concluded, great avisandum must be made with the proof. This is done by calling the act in the sale; after which a state must be prepared in the same manner as in other concluded causes, with the addition of a scheme of the yearly rent, and value of the estate, as proved, by way of an account.

If, upon advising the state, the Lords shall find, that the amount of the debts in the ranking does exceed, or is nearly equal to the value of the estate as proved, the court will ordain the estate to be sold, and letters of publication * to be issued, notifying the time of the roup, in the precise terms of the act of parliament 1681; which

* A letter of publication is a writ in the King's name, and under his signet, signed by a clerk of session.

Ch. II.

p. 3. c. 17

“ ordains the sale to be by a public
“ roup, not being under the rate
“ and price appointed by the Lords
“ of Session; and that the roup
“ be made after public intimation
“ at the market-cross of the head
“ borough of the shire where the
“ lands lie, and at the head bo-
“ rough of the bailiery, stewarty,
“ or regality, if they lie within
“ the same; and at the parish-
“ kirk * where the lands lie, and
“ at six other adjacent parish-
“ kirks, (to be named by the
“ Lords of Session), at the dissol-
“ ving of the congregation, on a
“ Sunday after the forenoon’s ser-
“ mon, by letters of intimation
“ under the signet, upon the
“ Lords deliverance; which let-
“ ters shall specially express the
“ time and place of the roup; and
“ that the creditors having real
“ rights and possession, shall be
“ specially cited upon twenty-one
“ days, and all other persons con-
“ cerned, whether within or with-

* Church.

“ out

“ out the kingdom, at the mar-
“ ket-crofs of the head borough of
“ the shire, stewarty, or regality,
“ where the lands lie, and at the
“ market-crofs of Edinburgh, and
“ pier and shore of Leith, upon
“ sixty days; and that a copy of
“ the said intimation shall be af-
“ fixed at all the places aforesaid,
“ expressing the lands to be roup-
“ ed, the price appointed by the
“ Lords of Session, and the time
“ and place of the roup.”

Regalities being now abolished, A. S. 29th
Feb. 1752
executions of the letters of publi-
cation must be made at the mar-
ket-crofs of the head-borough of the
shire or stewarty within which the
lands lie.

Upon the day assigned by the
letters of publication, the estate is
put up to roup before the Lord
Ordinary on the bills, according
to articles of roup made out by
the clerk, and signed by his Lord-
ship; one of which is, That the
purchasers shall find caution for
the price.

If

If no purchaser shall appear to offer at the roup, or if, upon special reasons suggested to the Lord Ordinary, it shall appear to him, that a delay of the sale may be beneficial to all parties concerned, the roup may be adjourned to a day certain by an interlocutor signed by the Lord Ordinary, and such adjournment must be published in the Edinburgh newspapers.

If more offerers than one shall appear at the roup, the highest offerer shall be preferred; and upon report of the sale by the Lord Ordinary to the Lords, the court will pronounce a decret of sale, and adjudge the estate to belong to the purchaser, upon payment of the price; and remit to the Lord Ordinary in the sale to order a scheme of division to be made of the price.

The scheme of division being made out by an accountant, in consequence of a remit from the Lord Ordinary, his Lordship will ordain

ordain all parties having interest to see and object; and after it has remained a competent time in the clerk's hands, if no objection shall be offered to it, the scheme will be approved of by the Lord Ordinary, who at the same time will pronounce a decret of division, and warrant for the purchaser to pay the price.

If any person lawfully summoned, either in common form or edictally, shall suffer the decret of ranking to go out without producing and competing upon his interest, the decret and sale shall stand good notwithstanding, and the purchaser shall be bound to pay accordingly; and the person failing shall have no other remedy, but to pursue the receivers of the price, and their heirs, for repetition.

W. & M.
P. 1695.
C. 6.
A. S. 23d
Nov. 1711
§ 8.

It is usual for the court, upon a petition of the agent in the sale, to grant warrant to the factor to advance money out of the rents, for carrying on the process, to the agent, upon his receipt and obligation

obligation to be accountable. And the agent's account is usually cleared by the Lord who is appointed Ordinary, to adjust the scheme of division of the price.

A. S. 23d
Nov. 1711
§ 9.

Before 1754, the expence of proceffes of fale and ranking was paid by the creditors, in proportion to their respective dividends of the price; but now the expence is ordered to be paid out of the price, and only the residue thereof to be divided among the creditors.

A. S. 10th
Aug. 1754

W. & M.
P. 1695.
c. 6.

After the elapfe of one year from the decret of fale, the purchaser may, by warrant of the court, confign the price into the hands of the town of Edinburgh, at 3 *per cent.* interest; and fuch confignation fhall be a fufficient difcharge to him for the price.

A. S. 11th
Mar. 1767

Proceffes of fale which have not been prepared, inrolled, and put up on the wall, at leaft ten federunt-days before the end of the fef-
fion, fhall not be advifed in that fef-
fion.

S E C T. VIII.

Process of Ranking and Sale at the instance of an apparent heir.

THIS process is founded upon W. & M.
an act of parliament in 1695, P. 1695-
C. 24.
and is carried on in the same manner as the process of sale in the case of bankruptcy, with the two following exceptions.

1. The estate may be sold, although there be no bankruptcy.
2. The sale may proceed before the ranking is completed.

S E C T. IX.

Process of Removing.

THE form of proceedings in A. S. 14th
Dec. 1756
§ 7.
this process, is the same as in an ordinary action; with this difference, that it is intitled to summary dispatch, without abiding the course of any roll.

2dly,

A. S. 14th
Dec. 1756
§ 6.

2dly, In case the process is commenced before an inferior court, and the defender shall offer a bill of advocation, he shall, within ten days after the bill is passed, find caution for implement of what shall be decerned, as in a suspension.

SECT. X.

Process of Multiple-poinding.

A. S. 1st
Feb. 1677

THIS process may be repeated *incidenter* in a process of forthcoming, without a new enrolment. In all other things, the proceedings are the same as in ordinary actions.

SECT.

S E C T. XI.

Declarator of Division of Commonty.

THough the proceedings in this process, and in that of the division of run-ridge lands, is very near the same as in other ordinary actions; yet as great accuracy and exactness is required in carrying them on, it may not be improper to give a particular account of them here.

The first of these processes is founded upon an act of parliament in 1695; which statutes and ordains, That all commonties, excepting commonties which belong to the King in property, or to royal boroughs in burgage, may be divided at the instance of any having interest, by summons raised, against all persons concerned, before the Lords of Session; who are by the said act impowered to discuss the relevancy, and to determine upon the rights and inte-

M

rests

W. p. 1.
1695. ch.
38.

rests of all parties concerned; and to value and divide the same, according to the value of the rights and interests of the several parties concerned; and to grant commissions to sheriffs, stewarts, bailies of regalities, and their deputies, justices of peace, or others, for perambulating and taking all other necessary probation; which commission shall be reported to the Lords, and the process shall be ultimately determined by them.

By this act, the Lords of Session are also impowered, either to divide mosses which happen to be in the said commonities; or if such mosses cannot be conveniently divided, to declare that they shall remain common, with free ish and entry * thereto, whether divided or not.

The interest of the heritors having right in the common, is ordered by the said act to be estimated according to the valuation of their respective lands or properties;

* i. e. egress and ingress.

and the share to be allotted to each heritor is appointed to be made next adjacent to his property.

The preliminaries of this process are carried on in the same manner as in ordinary actions in the outer house.

The common exceptions to this process are, either to the pursuer's title, or to the competency of the action, in case the commonty falls under the exception in the act of parliament.

When the action is sustained by the Lord Ordinary, the form of the interlocutor is as follows.

“ Finds the pursuer intitled to
“ carry on the action ; and finds
“ the libel of division relevant ;
“ and grants commission to
“ to visit and perambulate, and to take cognisance
“ of the several limits and marches of the commonty or muir
“ libelled ; and to take all necessary probation thereanent *, by
“ the oaths of such habile witnes-

* i. e. Concerning it.

“ ses as shall be adduced by the
“ parties for ascertaining the li-
“ mits and extent of the said com-
“ monty, and the possession of the
“ respective parties therein, and
“ extent and endurance of such
“ possessions, and of any interrup-
“ tions that may have been made
“ by the parties to one another’s
“ possessions, and for what rooms*
“ or lands such possessions have
“ been had; and ordains extracts
“ of the valuation of the lands †
“ so possessed, to be produced be-
“ fore the commissioners; and
“ likewise to take trial and cogni-
“ tion, by the oaths of such wit-
“ nesses as shall be adduced by the
“ parties, of the different qualities
“ of the ground; and to cause
“ measure the said whole com-
“ monty, and every parcel there-
“ of, as the same shall be distin-
“ guished by its different quali-
“ ties; and, for that end, to call
“ to their assistance persons skilled

* Farms.

† Authentic certificates of the value of the lands, as rated in the books for the land-tax.

“ in measuring ground, and to
 “ cause them, upon oath, make
 “ out a scheme or map of the said
 “ whole commonty in its quanti-
 “ ty, and of every parcel thereof,
 “ as it shall be distinguished by its
 “ different qualities; and thereaf-
 “ ter to proceed to divide the said
 “ ground among the parties ha-
 “ ving interest therein, and that
 “ according to the valued rents of
 “ the several lands *, as part and
 “ pertinents whereof they possess
 “ the commonty; and that in the
 “ appointment of their shares,
 “ each heritor's † part shall be
 “ set off to him, so as it may be
 “ ewest ‡ and most convenient to
 “ his property-lands; and to put
 “ and set march-stones for divi-
 “ ding each heritor's proportion
 “ from the other; as also to di-
 “ vide, in the same manner, the
 “ mosses, if any be, lying within
 “ the said common muir, among
 “ the said heritors; but in case it

* Rents at which the lands are rated in the books kept for the land-tax.

† Landholder.

‡ Nearest.

“ shall be instructed to the com-
“ missioners, that the said moſſes
“ cannot be conveniently divided,
“ to cauſe leave the ſame ſtill com-
“ mon, with free iſh and entry
“ thereto; and that upon the
“ ground of the ſaid commonty,
“ or any place in the neighbour-
“ hood thereof, as ſhall appear
“ moſt convenient to the commiſ-
“ ſioners, any of the lawful day
“ or days o the month of
“ or to the day
“ thereof next to come, and aſſigns
“ the ſaid day of
“ next to come, for report-
“ ing the ſame; and grants
“ diligence at the inſtance of all
“ parties, purſuers and defenders,
“ for citing witneſſes to compear
“ before the commiſſioners to the
“ effect foreſaid; and ordain the
“ commiſſioners in the diſiſion to
“ have a due regard to the hou-
“ ſes and property-lands of the
“ ſeveral parties having intereſt:
“ and in order that no party in-
“ titled to a ſhare in the ſaid di-
“ ſiſion may be excluded therefrom,
“ authoriſe the clerk to receive
“ ſuch

“ such interests * as may be pro-
“ duced before extract; as also
“ appoints the commissioners to
“ receive such interests as shall be
“ produced before them, though
“ not produced in the extract;
“ and to admit the parties so pro-
“ ducing to a share in the said
“ division, according to their fe-
“ veral rights, interests, and pos-
“ sessions, in the same manner as
“ is above described.”

When this commission is re-
ported, the act may be called, and
great avifandum may be made
with the proof and division; after
which a state must be prepared.
The form of proceeding afterwards
is the same as in other concluded
causes.

When disputes arise between
the parties in the course of the ex-
ecution of the commission, the
commissioner commonly delays
making the division until the re-
port of the proof be advised by
the court.

* The title-deeds and vouchers of the several
rights of the persons claiming.

Process of Division of Runridge-lands.

W. P.

1695 c 23

Lands lying in runridge may also be divided; but this process is appointed to be carried on before the sheriffs, stewarts, or justices of peace of the severall shires where the lands lie; and the form of proceeding is the same as in that of the division of commonty.

By this act, the judges are directed to have special regard to the mansion-houses of the respective heritors, and to adjudge to them in the division, such parts as shall be most commodious to their respective mansion-houses and policy.

Borough and incorporate acres are excepted from this act.

Though the act impowers justices of peace to judge of divisions of runridge-lands, parties seldom or never bring such actions before them, unless when the subject to be divided is of very little value.

S E C T.

S E C T. XII.

Process by Petition and Summary Complaint.

THIS section consists of two branches.

1. Petition for sequestration;
2. Petition and complaint.

§ 1. *Petition for Sequestration.*

In cases of bankruptcy, or competition of creditors, to prevent any loss that may happen to parties during the litigation, the Lords may sequester the estate, and appoint a factor for managing thereof. This is done upon a petition to the court, at the suit of any of the parties concerned, which must be intimated according to the forms prescribed in incidental petitions.

The act of sequestration is pronounced by the Lords in presence; A. S. 22d
but they usually remit to the Lord ^{Nov. 1711}
Ordinary § 10.

Ordinary in the cause to name the factor; who must find caution to account for his intromissions, and also to obey the rules and instructions appointed by the Lords.

Order of
court, 17th
July 1764.

Petitions for sequestrations shall not be received after the 25th of July for the summer-session, and the 20th of February for the winter-session. *Vide* Petitions, above, ch. 3. sect. 2.

Upon the factor's finding caution, an act of factory must be extracted.

A. S. 22d
Nov. 1711
§ 6.

The factor shall, within six months after the extracting of his factory, make up a rental * of the estate, and a list of the arrears of rents, to be reported to the Lords, and lodged in the hands of the clerk of the process, there to remain, and to be made forthcoming to all parties having interest.

Ibid. § 7.

When any alteration happens in the rental, such alteration shall, within three months, be reported

* Rent-roll.

to the Lords, and shall be put into the clerk's hands.

If any part of the rental, or charge, shall be omitted, or concealed, the factor shall be liable for the double of what is so omitted. A. S. 22d Nov. 1711 § 8.

The factor shall, once every year, give in a scheme of his account, charge and discharge, to the clerk of the process, under the penalty of a fine, to be modified by the Lord Ordinary, not under half a year's salary, and also of being liable to be removed. Ibid.

Factors have one year after the term of payment allowed to them for the recovery of rents or debts; after which they are liable to pay interest for the money received. A. S. 31st July 1690.

The like regulations are made with respect to factors on the estates of pupils not having tutors, and all other factors named by the court, (excepting where it is otherwise provided by former acts), with additional directions for making inventories of the effects and debts, and for confirming debts and A. S. 13th Feb. 1730

and moveables in the name of the factors when necessary.

A. S. 13th
Feb. 1730.
§ 8.

The factor, in these last cases, is also impowered to grant tacks, to continue during the time the estate shall be under sequestration, and for one year longer; but factors on bankrupt estates are seldom authorised to grant tacks for more than three years certain.

Ibid. § 11.

The cautioners for factors shall be bound with the factor, jointly and severally, that the factors shall obey the rules laid down in this act.

§ 2. *Process by Petition and Complaint.*

Summary complaints are competent against members of the court, for malversation in their office, and also against parties in processes, for any wrong done relative to the process in dependence: and in some cases, such

10th G. II.
c. 28. § 6.

complaints are authorised by act of parliament, such as complaints for penalties incurred by acting plays;

plays; which must be lodged within six months after such offence.

2. Complaints for penalties imposed for wrongs done in the election and returning of members of parliament, which are ordered to be proceeded in summarily, upon thirty days notice to the person complained of, without abiding the course of any roll.

16th G. II.
c. 11.
§ 17. 24.
30. 31. &
43.

Though the intention of parliament, in allowing these actions to be brought by way of summary complaint, seems to have been for quick dispatch, and to save expence; yet neither of these ends have been obtained by it. A summons in the common form would have answered the purpose much better, provided such summons had been ordered to be inrolled in the summary roll in the inner house, without being called in the outer house; as was practised in the case of the actions of valuation at the instance of his Majesty's Advocate, against the claimants on the forfeited estates. This will appear evident, if the circumstan-

ces of the two different forms are attended to.

An ordinary summons may be issued and executed in time of vacance; by which means, if it contains only one diet, it may be proceeded in upon the first day of the session; whereas a petition and complaint must be moved in court, before a warrant can be granted for serving it upon the defender, whereby thirty days of the session at least must necessarily be gone, before any proceeding can be had upon it. The time allowed to the defender to put in his answer to a complaint, is also much longer than that of an ordinary summons on one diet; and the expence of a petition and complaint is much greater.

PART

P A R T II.

Processes originally commenced in an inferior court, and from thence removed to the court of session by advocacy or suspension.

C H A P. I.

Preliminaries of Process.

PROCESSES before inferior courts may be removed from thence to the court of session, either, during the dependence of the action, by *advocation*; or, after sentence is pronounced, by *suspension*.

Advocation and suspension are writs issued in the King's name, and under his signet, and signed by a clerk to the signet.

Both these writs proceed upon a warrant signed by one or more

of the judges *causa cognita*, upon a bill of complaint preferred in name of the party who thinks himself injured, and signed by a clerk to the signet, setting forth the reasons why the cause should be either advocated or suspended.

A. S. 9th
Feb. 1675

All bills, either of advocacy or suspension, must be presented by the clerk of the bills, or his servant; who is directed to keep a roll of all such bills, according to the order of time in which they are presented, and a minute-book, both of passed and refused bills, by the alphabetic order of the parties surnames, which he is to make patent to every charger *gratis* when desired.

A. S. 9th
Feb. 1675

The Lords, by turns, attend the advising of bills for a week, *viz.* from Tuesday to Tuesday; and all bills are advised by the Lord Ordinary in the first instance.

The usual time of attendance is from nine to ten in the morning in time of session, and from eleven

eleven to twelve on Tuesdays and Thursdays in the vacation.

Bills presented in time of session A. S. 111th must remain before the Lord Or-^{Nov. 1692} dinary, to whom they are first presented, until they shall be advised. but bills presented in time of vacance, and not advised within the week, shall be advised by the next week's Ordinary.

S E C T. I.

Of Bills of Advocation.

Here are some processes which can neither be brought before the court in the first instance, nor removed from the inferior court by advocation, though the Lords may give directions to the judge in what manner to proceed; such as,

1. Processes for sums not exceeding L. 12 Sterling, excepting upon the head of incompetency.

This sum was formerly limited

N 3

to Ch. II.
P. I. sess. 35.
c. 9.

Act. reg. to 200 merks Scots, or L. 11, 2 s.
1672. § 17 $2\frac{2}{3}$ d. Sterling.

W. p. 2. Process for profanity and
1696. immorality.

c. 31. 3. Process for ministers sti-
W. p. pends.
1695.

c. 27. In this action, sists of process,
as well as advocations, are dis-
charged by the statute.

Ch. II. 4. Process expressly appointed
p. 1. sess. 3 by statute to be judged by infe-
c. 9. rior courts; such as,

(1.) Process maritime, both be-
fore the judge of the high court of
admiralty, and inferior judge-ad-
mirals.

J. VI. p. (2.) Process of divorce, before
1609. c. 6. the commissaries of Edinburgh.

Ch. II. Advocations from the high
p. 1681. court of admiralty are discharged
c. 16. by statute; and it has been often
found by the Lords, that it is not
competent for them, upon a bill
of advocacy, to give instructions
to the judge of that court as to
his manner of proceeding.

But advocations from the com-
missaries are expressly allowed by
the statute 1609, though by the
same

same act, the commissaries of Edinburgh are declared to be the sole judges in matters of divorce; and therefore the Lords, upon advising bills of advocacy of such processes, generally remit the cause to the commissaries, with instructions in what manner they are to proceed.

Bills of advocacy of a process of removing, cannot be passed by one Lord, though they may be refused by him. If such bills are presented in time of session, before they are passed they must be reported to the court; and if presented in time of vacance, they must be advised by three Lords met together.

A.S. 14th
Dec. 1756

Reasons of Advocations are,

1. Incompetency of the inferior court before which the action is brought.
2. Personal exceptions to the judge.
3. Contingency of the process to be advocated with another process

cess depending before the court of session.

4. A wrong done by the judge. Members of the college of justice are not amenable in civil actions before any inferior judge; they may therefore advocate all processes brought against them, of whatever extent, without assigning any other reason than that of their privilege.

Mary par.
1555.
c. 39.
Act reg.
1672. § 16

This privilege does not extend to cases where the inferior judge acts under the express authority of a particular act of parliament.

S E C T. II.

Of Bills of Suspension.

THE form of passing bills of suspension is the same as of bills of advocacy; with these exceptions: 1. In suspensions caution must either be offered, or the sum charged for must be consigned; whereas in advocations, caution is not required, excepting in the case of

A. S. 14th
Dec. 1756
§ 6.

Ch. I.
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of removings, where the advocator is obliged to find caution, as in suspensions, within ten days after passing the bill.

2. Bills of suspension contain-^{A.S. 21st July 1675.} ing charge to set at liberty, must be intimated to the creditor personally, or at his dwelling-place, by a notary, and witnesses, if within Scotland, before the bill shall be presented. This intimation must be instructed by an instrument under the notary's hand; and the bill must be presented within a week after such intimation.

In some cases, suspensions are not competent; such as,

1. Suspensions of decreets-arbitral upon subscribed submissions, which are declared by statute not to be reducible, excepting upon account of corruption, bribery, or falsehood, alledged against the arbiters.

Though suspensions do not fall ^{Act reg. 1695. § 25} under the words of this statute, they are held to be comprehended under it, the inductive reason of the

the statute being the same with respect to both. *Vide* Process of Reduction, Part 1. chap. 4. § 1.

Act reg.
1672. § 19

2. By the act of regulations 1672, it is enacted, "That decreets *in foro contradictorio*, before the Lords of Session, shall not be suspended upon reasons competent to have been proposed, or which were repelled in the former decret." But if any matters of fact of importance to the cause, which were not known to the party when the decret was pronounced, shall be afterwards discovered by him, the Lords will admit of a suspension upon that ground.

By this act, decreets are held to be *in foro* when defences have been proposed, although the advocate for the defender shall afterwards have withdrawn his appearance.

Ibid.

Second and posterior protestations are ordered by this act to be booked as decreets *in foro*; and the clerk of the bills is ordered, upon his peril, not to write on bills of suspension

pension of any decret of the Lords *in foro*, until the bill shall be presented to the Lords in presence in time of session, or three Lords met together in time of vacance.

The following bills cannot be passed by a single Ordinary, but must be reported to the court, if presented in time of session; and if presented in time of vacation, such bills must be advised by three Lords met together, though one Lord may either refuse the bill or grant a sist.

1. Bill of suspension of a process of removing. A. S. 14th Dec. 1756

2. Bill of suspension, containing a charge to set at liberty. A. S. 21st July 1675.

3. Bill of suspension of a sentence of the court of session *in foro contradictorio*, or of a decret obtained in the said court, after discussing a former suspension, for liquid sums, or deeds presently preftable. A. S. 29th Jan. 1650. Act reg. 1672. § 19

4. A second bill of suspension in the same cause, when a former has been refused. A. S. 9th Feb. 1675 A. S. 9th Nov. 1680

5. Bill

Act reg.
1672. § 19

5. Bill of suspension of a second protestation.

Ch. II.
p. 1681.
c. 16.

6. Bill of suspension of a decreet of the judge of the high court of admiralty.

7. Bills of suspension on juratory caution.

A. S. 6th
Dec. 1677

8. Bills of suspension for his Majesty's excise, which shall not be passed, excepting in presence of all the Lords.

A. S. 10th
July 1677.
Act reg.
1672. § 19

In order that it may appear what number of bills of suspension have been offered of the same charge, the clerk of the bills is ordered to mark the number on the deliverance of the bill.

The following bills of suspension are discharged, unless upon payment or consignation.

W. p.
1696.
c. 31.

1. Decrees for profanity and immorality.

W. p.
1695.
c. 27.

2. Decrees at the instance of a minister for payment of his stipend.

W. p.
1696.
c. 14.

3. Decrees for payment of stipends to universities and hospitals.

4. Decrees

4. Decrees for payment of salaries of parochial schoolmasters. W. p. 1696. c. 26.
5. Bills of suspension on a first protestation. In this case the suspender must consign L. 30 Scots. Act reg. 1672. § 19

6. Bills of suspension of charges on notes of the royal bank of Scotland, and other banking companies.

These last cannot be suspended but upon offer of payment. 5th G. III.

7. Bills of suspension of decreets of forthcoming. A. S. 1st Feb. 1677

8. Bills of suspension upon account of double poinding, when there is no other reason in the bill. A. S. 16th Jan. 1650

Suspension shall not be passed upon account of arrestments, unless upon double poinding. A. S. 1st Feb. 1677

By the practice, the summons of multiplepoinding must be executed before presenting the bill of suspension.

By an act in 1650, the clerk of the bills was ordered to present no bill of suspension of a charge for a liquid sum, unless at the same time the ground of the charge
O charge

charge is also produced: and where the ground of the charge is a decret of an inferior court, the suspender is ordered either to produce an extract of the decret, or an instrument, bearing, that the clerk had refused such extract, excepting in the case of consignation.

This rule was intended to prevent vexatious suspensions; but it being attended with a very great expence to the suspender, the act fell into disuse. If, when the allegations in a bill are found relevant by the Lord Ordinary, it were ordered to be intimated to the charger personally, or at his dwelling-place if in Scotland, tho', when he is not in Scotland, the suspender were obliged to produce the grounds of the charge, in terms of the act 1650, the expence of extracts would, in most cases, be saved to the suspender, and, at the same time, chargers would have an opportunity to shew cause why such bills should not be passed.

The

The Lord Ordinary, upon reading the bill, generally ordains it to be answered; but if the matter appear clear, he may refuse it without an answer.

After the bill is passed, upon a new application of the party before the letters have passed the signet, the Lord Ordinary may reconsider it, and stop execution for some time, not exceeding a month from the time of presenting the bill. A. S. 9th
Feb. 1675

Sifts of execution upon bills of suspension having been often granted indefinitely, without mentioning any time, became very inconvenient; and therefore an act was made in 1677, by which it is declared, that no sift shall endure longer than a fortnight; and that when a bill is passed, such sift may be renewed, provided the same shall not exceed a month after the date of passing the bill; and that in case the suspender shall not find caution, and expedite his suspension within that time, the A. S. 3d
July 1677

O 2 charger

charger shall be at liberty to put his diligence in execution.

If an answer to a bill is put in to court, execution shall be sifted until the bill shall be advised.

A. S. 29th
Feb. 1688

When the reasons of suspension are offered to be proved by the charger's oath, if the reasons are relevant, the Lord Ordinary is authorised to take the charger's oath when present; and in his absence, his Lordship is directed to take the suspender's oath of calumny, that he has just reason to propone such ground of suspension; and if he shall depone *affirmative*, or if he shall not be present to give his oath, in either of these cases the Lord Ordinary is directed to pass the bill, with this quality, "That the suspender shall be liable to the charges and expences the charger shall be at through the purchasing of that suspension, and in discussing of the same, according as he shall depone upon these expences, without any *modification* thereof, " if

“ if the letters shall be found or-
“ derly proceeded.”

S E C T. III.

Of Bills of Advocation and Suspension.

BY an act in 1711, it is provi- A.S. 20th
ded, “ That where a reason of Nov. 1711
“ fuspension or advocation is of- § 2.
“ fered to be proven by the con-
“ trary party’s oath, and the said
“ party is absent, so that his oath
“ cannot be got, the bill, in so
“ far as concerns that reason, is
“ to be refused, unless the sus-
“ pender, or raifer of the advoca-
“ tion, do give his oath of calum-
“ ny thereupon, in case he be pre-
“ sent; and if absent, that some
“ document be produced under
“ his hand, for instructing, that
“ the reason is not insert in the
“ bill by the drawer without a
“ warrant; which document, and
“ other vouchers presented with
“ the bill, shall be kept by the

“ clerk of the bills, unless deliver-
 “ ed up by him to the party upon
 “ inventar and réceipt; and at or
 “ before discussing, the same, or
 “ the inventar and receipt, shall
 “ be transmitted to the clerk of
 “ the process, to the effect, that if
 “ the reasons are calumnious, or
 “ the vouchers be disproven, the
 “ suspender, or raiser of the ad-
 “ vocation, may be decerned in
 “ expences.”

A. S. 20th
 Nov. 1711
 § 1.

By this act, the Lord Ordinary is authorised to pass bills of suspension in part, and to refuse them as to the remainder, as he shall think proper.

A. S. 6th
 Dec. 1718

The Lord Ordinary on the bills, either in time of session or vacance, may grant commission to take the oath of an absent party, on any relevant point relating to the passing or refusing of a bill of advocacy or suspension; and may grant a sist in the mean time, not exceeding a month when the commission is granted by one Ordinary, and not exceeding two months

months if granted or prorogated by three Ordinaries.

If the Lord Ordinary shall either pass or refuse a bill of advocacy or suspension, it is competent to either party to apply to the court by petition for redress, provided it be done before the letters pass the signet.

The suspender, in all cases, A. S. 27th Dec. 1709 must either consign the sum charged for, or find caution for implement of the charge, and for payment of such sums as the Lords shall modify for expence.

This consignment must be in the hands of the clerk of the bills; but consignations made in the Order of Court, 16th Nov. 1738. course of a depending process, must be in the hands of one of the principal clerks of session.

The act of sederunt in 1709 A. S. 27th Dec. 1709 provides, That cautioners shall be liable for what shall be decreed against the suspender, though the decret charged on shall be turned to a libel; and that attestors of cautioners shall be bound as cautioners,

tioners, and shall be *subsidiarie* liable in their order.

Bonds of cautionry in suspensions must contain a clause, obliging the cautioner, his heirs and executors, for payment of the sums, or doing the deeds, for which he is become cautioner in the suspension, in the same manner as the suspender is bound; and such bonds must also be conceived alternatively, to pay or to perform to the charger, or to such unto whom payment or performance shall be decreed to be made, by the decret to follow on the suspension.

A. S. 18th Feb. 1686 “ The clerks of the bills shall be liable to the party’s damage, as well where he refuses a cautioner who is sufficient, or is holden and repute to be sufficient, as where he receives an insufficient cautioner.”

A. S. 29th Jan. 1650 To prevent imposition by production of forged discharges, or other writings, for verifying reasons of suspension, such writings are ordered to be kept by the clerk,

clerk, or marked by him, and re-
delivered upon receipt for produc-
tion when required; and by ano-
ther act, the Lord Ordinary is or-
dered to mark the writings. A. S. 11th
Nov. 1691

Both these acts are out of use,
so far as concerns the order to
mark the writings.

If the suspender shall not be
able to find caution, he may pray
to have suspension upon juratory
caution. In such case, the bill
shall bear, that he only offers jura-
tory caution; and he shall, before
the bill is passed, give in a dispo-
sition of all his estate real and per-
sonal, upon oath, in favour of the
charger, as in a *Cessio bonorum*.
This is called *juratory caution*. A. S. 8th
Nov. 1682

In this case, the suspender shall
not have the benefit of a commif-
sion, but shall depone in presence
of the Lord Ordinary. Ibid.

If the suspender is in prison, he
shall not have the benefit of sus-
pension upon juratory caution. Ibid.

The party to whom caution is
to be found, may pass from the
benefit of it, and before the sus-
pension

A. S. 11th
Nov. 1691

pension or advocation pass the signet, may apply to the Lords by petition, praying a remit to the Lord Ordinary to discuss the reasons on the bill;—upon which the court will remit the cause to the Lord Ordinary to discuss the reasons. But in such cases, the secretary's fees for signeting the suspension, and 4 s. Scots as the fees of inrolment, shall be paid to the clerk of the bills within twenty-four hours after such warrant shall be obtained, otherwise the warrant for discussing shall be cancelled.

After bills of advocation and suspension are passed, and caution is found, or consignation is made, where it is required, letters of advocation or suspension must pass under his Majesty's signet.

These letters are signed by a clerk to the signet, and bear warrant for citing parties as in a summons, and a list of proceedings, or of execution, in the mean time.

Advocations are sometimes executed by a messenger in the way of

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of a summons, citing the party to appear at the day appointed. In such case, the advocacy may be called as a summons. This form seems to be competent also in suspensions; but as in most cases the suspender is desirous that the matter should lie over, the execution, and calling of suspensions in the way of summons, is seldom used.

After the days assigned in the A.S. 29th advocacy or suspension are elapsed Jan. 1650. the party against whom such letters are obtained, may call for production of the advocacy or suspension, by putting up a protestation in the minute-book; and if the letters are not produced, the protestation may be extracted, after it is read in the minute-book: the effect of which is, that no regard shall be had, either to the advocacy or suspension; and the party who obtains the protestation is intitled to a warrant for payment of L. 8 Scots of expences, in case the sum charged for is within 100 merks,

A. S. 4th
July 1661.A. S. 1st
Jan. 1709.

merks, and L. 10 Scots if it shall exceed that sum.

By an act in 1709, it is ordained, " That where a pursuer before
 " any inferior court advocates his
 " cause, and does not insist with-
 " in *fifteen days* after admitting of
 " the advocacy, (not reckoning
 " the vacancy), and causes call the
 " same, and give it out with the
 " process to the defender's procura-
 " tors to see, that then, and immedi-
 " ately thereafter, the defender may
 " call for the advocacy, and put
 " up a protestation at the minute-
 " book; whereupon the pursuer
 " shall be obliged to produce his
 " advocacy, with the principal
 " process, and an outgiving there-
 " on; otherwise the protestation
 " and remit shall not be scored,
 " but given out to be extracted;
 " and the defender, when the ad-
 " vocation is so produced, with
 " the process and outgiving, shall
 " be allowed, before he returns the
 " process, to inroll the same in
 " the roll of suspensions and advo-
 " cations, upon his own advocate's
 " return;

“ return; and for that effect, al-
 “ lows the defender’s procurators
 “ to keep up the process six days
 “ allowed for seeing, and until
 “ the first *Saturday* in session-time
 “ thereafter, so as he may get the
 “ process inrolled.”

By the same act, the clerks of ^{A. S. 1st}
 the bills, and their deputes, are ^{Jan. 17c9}
 ordained, “ under the penalty of
 “ L. 5 Sterling, to give up all
 “ protestation-money consigned in
 “ their hands, without any fees,
 “ to the party concerned, upon
 “ sight of the extracted protesta-
 “ tion, or decret, finding the let-
 “ ters orderly proceeded, and re-
 “ ceipt of the party in a discharge,
 “ expressing the substance and
 “ date of the warrant, without
 “ necessity to leave the Lords
 “ warrant.”

If, instead of extracting the pro- ^{A. S. 9th}
 testation, the party shall be defi- ^{Nov. 1680}
 rous to have the merits of the
 case tried, he may extract the sus-
 pension from the signet; and up-
 on production of such extract un-
 der the hands of the keeper of the
 P signet,

signet, the Lord Ordinary, besides the ordinary expence of protestation, will give large expences against the suspender, upon account of the delay.

After production of the advocacy or suspension, the process must be given out to the other party's advocate; who must give a signed return, in the same manner as in ordinary actions in the outer house; after which, the process must be inrolled in the suspension-roll.

A. S. 28th
Feb. 1662.

The suspender's advocate shall also, with the suspension, produce the whole eiked reasons and vouchers, to be given up to the charger; with certification, that when the cause shall be debated, the reasons shall be repelled which shall not be instructed and instantly verified.

This most useful order for giving in eiked reasons and vouchers, is now out of use.

CHAP.

C H A P. II.

*Proceedings before the Lord Ordinary
in the Outer House.*

A T the hearing of the cause, the reasons ingrossed in the suspension, and referred to the charger's oath at the time of passing the bill of suspension, shall be insisted on in the first place, and the party's oath taken, or passed from; and if such reasons shall be repelled, either as irrelevant, or as not being proved, large expences shall be given; and the suspender shall pay, or consign, the same, before he shall be heard upon any other reasons of suspension, either libelled or eiked, excepting such reasons as shall be instantly proved by writing.

A. S. 16th
Jan. 1650

If the advocator, or suspender, shall neglect to produce the advocacy or suspension when the cause is called, the Lord Ordinary will grant protestation; which has

the same effect with a protestation put up in the minute-book.

A. S. 1st

Jan. 1709

By an act of 1709, it is ordained, " That where-ever a judicial protestation, or protestation and remit, shall be admitted by the Lord Ordinary, through the keeping up of suspensions or advocations, unless the cause be again called by the Ordinary, and the suspension or avocation also produced the same week; before the suspension or avocation be taken in by the clerk, or the party reponed against the said protestations, every such party shall pay to the contrary party, or to the clerk for his behoof, the sum of *ten* shillings Sterling." And the like sum is ordered to be paid where the suspender or advocator allows a decret finding the letters orderly proceeded, or an act and remit, to be pronounced, for not debating the reasons of suspension or avocation, before the party is allowed to be heard against the said decret or act, unless application be made

to

to the Ordinary, and a stop obtained in writing, within six free days after the date of the Ordinary's decret or remit.

If, upon hearing the reasons of advocacy, the Lord Ordinary shall be of opinion, that decret should pass against the advocator, he may either advocate the cause, and pronounce decret, or he may remit it to the court where it first depended. This last is often attended with new delays; and therefore it is more eligible, that the process shall be advocated and tried by the Lord Ordinary, unless the question in dispute is of small importance; in which case, it is sometimes better to have the process remitted to the court from whence it came, with instructions to the judge how to proceed, if he has done wrong.

If the decret suspended shall have proceeded upon the defender's being held as confessed, upon a reference to his oath, he shall not be reponed until he pay the expence of obtaining and extract-

ing the decret before the inferior court.

If the proceedings before the inferior judge have been irregular, the Lord Ordinary will turn the decret to a libel; but if the reasons of suspension are instantly verified, he will suspend the letters.

If the reasons of suspension are either irrelevant, or not instantly verified, the letters shall be found orderly proceeded.

After the first hearing in the outer house, the form of proceeding, in advocations and suspensions, is the same as in ordinary actions.

A. S. 14th
Dec. 1756
§ 7.

Advocations and suspensions of processes of removing, shall be discussed summarily, without abiding the course of any roll.

CHAP.

C H A P. III.

Process of Prevento termino.

IF the day assigned for compar-
ance in the suspension is long,
the charger may raise a summons
for shortening that time; which is
called a *summons preventivo termino*;
but this form is now out of use,
the day assigned in suspensions be-
ing short.

P A R T

P A R T III.

Of Proceſs of Wakening and
Transference.

AFTER a proceſs is once heard in court, if it ſhall be allowed to lie over, without any judicial proceeding, for a year and a day, it is ſaid to have fallen aſleep; and parties ſhall not be obliged to answer without a new citation. In ſuch caſe, a ſummons of wakening may be raiſed at the inſtance of either party, and the adverſe party may be cited to hear the proceſs wakened.

If either the defender or purſuer ſhall die during the dependence of the action, the proceſs muſt be ſiſted until proper parties ſhall appear. Anciently, the proceſs behaved to be transferred actively as well as paſſively; but
now

now it is not necessary, upon the death of a pursuer, to transfer the process actively, by raising a summons, but only to produce the person's title who claims under the right of the first party.

It is not necessary, in a summons of transference, to libel the whole proceedings of the original process, as formerly; but only to recite the new pursuer's active title, and the passive title against the defender, with the conclusion of the original summons.

These two summonses of wakening and transference must be called, given out, seen, and returned, as ordinary actions; but need not be inrolled in the ordinary action roll for the outer house.

After a summons of wakening is called, given out, seen, and returned, the process may be inrolled in the hand-roll of the Lord Ordinary before whom the process originally depended.

Though a summons of transference may be called without being inrolled, it is sometimes called before

W. & M.
p. 1693.
c. 15.

A. S. 16th
Feb. 1723
§ 4.

A. S. 26th
July 1688.

before the Lord Ordinary in the outer house as an act, and sometimes in the regulation-roll; and a decret of transference must be obtained, before any farther proceeding can be had; after which the process may be proceeded in before the former Ordinary to the process, as in a wakening.

After the process is wakened and transferred, the proceedings in the original cause shall go on in the same manner as if the original parties were all alive, and the process had not slept.

PART

P A R T IV.

Regulations concerning the Minute-book, the extracting of Acts and Decrees, and the Poor's Roll.

S E C T. I.

Of the Minute-book.

THAT parties may have due A. S. 8th
Nov. 1649 notice of the proceedings of the court, a minute-book is appointed to be kept; in which the writer thereof is ordered to put up, and insert, all protestations, acts, decreets, and avifandums, made in the outer house, immediately after the pronouncing thereof; and also all acts and decreets passed in the inner house.

When a decret, act, or protestation, is pronounced against a defender or suspender in absence, A. S. 28th
Feb. 1662 the keeper of the minute-book is ordered

ordered to mark it so in the minute-book.

A. S. 9th
July 1709.

By a later act, all acts, decreets, and protestations, are ordered to be put up in the minute-book, of the date they are signed.

A. S. 10th
Dec. 1687

When a decret is pronounced against more defenders than one, all the defenders names and designations against whom decret is pronounced, must be inserted in the minute-book; except decreets given against tenants in poindings of the ground, removings, and for mails and duties; wherein it shall be sufficient to mention them to be tenants in such a barony or tenandry: but if any of the defenders called, or a third party comparing, shall plead upon his right, and decret shall be given against him, his name shall be inserted in the minute-book. This act contains a certification, that if any of the defenders names shall be omitted to be put in the minute-book, the decret as to that person shall be void and null.

The

The minute-book being intended as a notification of the proceedings to the practitioners in the court, was anciently read aloud in the outer house by the clerk, every day, before the Lord Ordinary left the bench; but latterly, the keeper of the minute-book has been in use to send the book to agents houses, upon payment of a fee, which has rendered the notification by reading less necessary, though it is still continued to be read by an agent instead of the clerk; and the person who reads it, marks the minute-book with his name: the only use of which is, to ascertain the time assigned for giving out extracts, which is now rendered more certain, by ascertaining the time of commencing to read the minute-book to be upon the 6th federunt-day of each session, and within three days after the commencement of the Christmas vacance.

A. S. 8th

Nov. 1649

A. S. 3d

Nov. 1671

A. S. 5th

June 1725

A. S. 19th

Dec. 1713

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S E C T.

S E C T. II.

Of the extracting of Acts and Decrees.

A. S. 20th
Jan. 1671
A. S. 5th
June 1725

ALL protestations, acts, interlocutors, or sentences, which require to be extracted, excepting incident diligences, must be first put up and read in the minute-book; and no extract thereof shall be given out until twenty-four hours after the same is read in the minute-book.

A. S. 6th
Feb. 1748

When a representation offered against a decret formerly pronounced, is refused, the decret must again be put up in the minute-book. This decret does not require to be read a second time in the minute-book, but may be extracted upon the elapse of three days after it is last put in the minute-book.

The Lords sometimes allow acts to be extracted without abiding the reading of the minute-book; but

Sect. II. *Extracting Acts, &c.* 183

but this must be done by a particular dispensation in the interlocutor.

Acts and decreets against more debtors than one, or in competitions of rights, may be extracted in parts, without being obliged to extract the rest of the proceedings. Act reg. 1695. § 17

The clerks are intitled to the fees of extracting decreets after decret is pronounced, though the decret shall not be extracted.

This was determined in a case of Sir James Stewart of Burray, in-^{20th July} 1753. grossed in the sederunt-book.

By the regulations in 1695, " It Ch. II. 1
" is ordained, That in place of the P. 1661.
C. 31.
Act reg.
" allowance formerly used in ad-
" judications or apprisings, there 1695. § 24
" be only a short abbreviate made
" of the decret of adjudication,
" after the manner of the said allowance; and that this abbreviate
" be at the pronouncing of the decret signed by the Lord Ordinary, pronouncer thereof, and
" given in to be recorded within

Q 2 " threescore

“ threescore days after pronouncing of the decret;” and the clerk is discharged to take in any abbreviate to be recorded after the expiration of the said sixty days.

Act reg.
1696. § 4

By the regulations in 1696, “ It is ordained, That for the greater security and satisfaction of parties concerned, albeit abbreviates fall to be written apart, and subscribed before the extracting of decreets; yet if any party shall desire the said abbreviate to be written upon the back of the decret, the same shall be done, if the decret shall be extracted, and the same desired within twice sixty days after the date of the pronouncing thereof; and the same Lord Ordinary who signed the first abbreviate shall sign the second indorsed.”

Though, by this article, it is left optional to parties to take one or two abbreviates, and one abbreviate is declared to be sufficient; it is usual to have two abbreviates signed

signed by the Lord Ordinary before the decret is extracted; one of which is left with the clerk who keeps the record, and the other is given to the party after the abbreviate is recorded.

After a decret of the Lords *in Act reg*
foro contradictorio is extracted, it ^{1695. §18} shall not be reduced and laid open upon nullities, further than *ad hunc effectum*, to hear parties for redress of prejudice sustained by such nullity; and the rest of the interlocutors in the decret shall stand, *tanquam res hactenus judicata*.

S E C T. III.

Of the Poor's Roll.

THE protection of the poor from the oppression of the rich, seems to have been very early an object of the legislature. In the reign of James I. a provision was made by parliament for the management

J. I. P.
1424-C.45

nagement of the causes of the poor.
The act is intituled, *Anent complaints to be decided before the judge-ordinar.*
And it is thereby, among other things, ordained, “ That gif there
“ be onie pure creature, for fault
“ of cunning, or dispenses, that
“ cannot, nor may not, follow his
“ cause; the King, for the love of
“ God, fall ordain the judge be-
“ for quhom the cause suld be de-
“ termined, to pur-wey, and get
“ a leil and a wise advocate, to
“ follow sik pure creatures causes;
“ and gif sik causes be obtained,
“ the wranger fall assyith baith
“ the party skaithed, and the ad-
“ vocatis coastes and travel. And
“ gif the judge refusis to do the
“ law eavenlie, as is before said,
“ the partie compleinand fall have
“ recourse to the King, quha fall
“ see rigorously punished sik jud-
“ ges, that it fall be example till
“ all uthers.”

In consequence of this statute, the judges, both in civil and criminal courts, do assign counsel and agents to poor suitors when demanded;

demanded; and the faculty of advocates, and society of clerks to the signet, do annually appoint some of their own number for the service of such poor litigants, in their several professions. But as these appointments would be of very little use to the poor suitor, were the fees of court to be exacted from him, the Lords of Session, upon evidence of his poverty, will grant warrant for the dispensing with the fees. This is called *the benefit of the poor's roll*.

The manner of obtaining this warrant, is by offering a petition to the court, which must bear the particular process for which the warrant is to be granted; and must be accompanied with a certificate of the poverty of the petitioner, signed by the minister and two elders of the parish where he resides. After reading this petition, the court usually remits to the advocates and writers for the poor, to examine the grounds of the petitioner's plea, and certificate

cate of his circumstances; and upon their report the warrant is granted, unless there appears no ground for the process. This warrant does not extend to any other thing than the process mentioned in the petition; and it continues in force only for three years; but is renewed of course upon application of the petitioner, in case the action for which it is granted is not determined within that time.

A. S. 20th
Nov. 1686

The clerks to the signet appointed for the poor, usually draw and sign the summons or libel, and make a full memorial of the case for the poor petitioner; they also make out for him all the necessary writs which pass the signet. But as it is no part of their duty, as clerks to the signet, to act as agents, the poor suitor is often at a loss for want of a solicitor. To prevent this inconvenience, the two societies of advocates and clerks to the signet, within these few years, have had several conferences; at which certain

certain regulations were proposed for managing the causes of the poor; but it is to be regretted, that these regulations have never yet been put in execution.

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FORM of PROCESS

B E F O R E

The Lords of Council and Session,

A S

Commissioners for plantation of
Kirks and Valuation of Teinds.

P A R T I.

Of the Constitution of the Court.

C H A P. I.

*Of the several Commissions granted by
the King, and by Acts of Par-
liament.*

BEFORE proceeding to
the particulars of the fe-
veral commissions grant-
ed by the King, and by
acts of parliament, it will be pro-
per to give a short account of the
reasons

reasons which induced government to grant these commissions.

In time of Popery, the clergy in Scotland had acquired a very large and extensive property in land, by donations and mortifications made by laymen to monasteries, abbeys, and other religious houses; the tithes and patronages of many churches had been also doted to these several religious corporations.

J. IV. p.

1503.c.91

By an act in 1503, the vassals of the King, as well spiritual as temporal, during the King's life, were allowed to let their lands in feu, without diminution of the rental; and in consequence of this, and several other acts of parliament, churchmen were in use of sewing out their lands, with the tithes included, for payment of a certain feu-duty both for stock and tithe. These tithes, from the words of the grant, got the name of *decimæ inclusæ*; and having been thus consolidated with the stock, were understood to be held by impropriation by the persons who acquired

acquired right to them; and consequently were exempted from all the burdens imposed on tithes after the reformation.

When the reformation took place, the temporalities of benefices were annexed to the crown by act of parliament; notwithstanding which, many of the lands and estates which had belonged to the church were erected into temporal lordships, and were granted by the King to his favourites. In most of which grants, the tithes and patronages, which had formerly belonged to the abbey, &c. were also comprehended.

The church being thus stripped of her property, it became necessary to make some provision for the clergy. For this purpose, as early as 1561, it was ordained by act of council, that the third of all benefices should be applied to the maintenance of the ministers in the first place, and the surplus to the maintenance of the Queen's house: and this assumption of the

R

thirds

J. VI.

P. 1587.

C. 29.

J. VI.

P. 1567.

C. 10.

J. VI. thirds of benefices was afterwards
 P. 1592. ratified by parliament.
 C. 123.

Hope's In 1561, a commission was
 Pract Ob. granted by the King and Queen
 tit. 2. § 17. to several of the nobility and mi-
 &c. nisters, under the name of, *The
 commission of plat for modifying sti-
 pends to ministers.* This court met
 yearly at Edinburgh in the month
 of November; and continued to
 act until the bishops were restored
 in 1606.

J. VI. In 1617, a commission was
 P. 1617. granted by parliament to eight
 C. 3. persons of each estate, viz. eight
 bishops, eight lords, eight barons,
 and eight burgeses, who were ap-
 pointed to meet at Edinburgh.

By the tenor of this commission,
 it was necessary that five commis-
 sioners of each estate should be
 present, and agree in one voice in
 every judgement and act of the
 court; otherwise such proceeding
 was declared not to be valid.

The business committed to the
 management of these commission-
 ers, in so far as concerns the mat-
 ters now to be treated of, was,

1. To

1. To modify a perpetual local stipend, out of the tithes, to the ministers of all churches which had not been formerly provided either with ministers or stipend; and also to the ministers of such churches as had been provided with both, in case such stipend did not amount to 500 merks Scots (L. 27 : 15 : $6\frac{2}{3}$ Sterling) in money, or five chalder of victual, besides manse and glebe.

2. To unite two or more parishes into one, provided the fruits or tithes of one of such parishes was not sufficient to pay the stipend; in which case the patrons were to have the right of presentation alternately.

3. Where the tithes of the parish did not amount to the value of 500 merks, and where an union was inconvenient, the commissioners were impowered to modify the whole tithes of the parish to the minister, besides manse and glebe.

4. In making such modifications, the commissioners are directed

rected to have no regard to tacksmen, patrons, or others, pretending right to the tithes; but as a recompence to the tacksmen for the loss occasioned by such modification, they are authorised to grant them a prorogation of their tacks.

5. The minimum of the stipend to be modified to the minister, is ascertained to be 500 merks Scots, (*i. e.* L. 27 : 15 : $6\frac{2}{3}$ Sterling), or five chalders victual, excepting where the tithes of the parish do not amount to so much; and the maximum is limited to 1000 merks, (*i. e.* L. 55 : 11 : $1\frac{1}{3}$ Sterling), or ten chalders victual.

In order to enable the commissioners to execute the commission, they are empowered to summon titulars *, patrons, tacksmen, and all others pretending to have right to the tithes, to produce their writings and title-deeds, to be judged of by the commissioners; whose sentence is declared to

* One who has a title to the tithes.

be final; and the commission is declared to subsist only until the term of Lammas 1618.

In 1621, another commission J. VI.
was granted by parliament, much p. 1621.
to the same purpose with the for- c. 5.
mer; only a few variations were made with respect to the number and quorum of the commissioners; to whom an additional power was also granted, to divide parishes when too large; but with proviso, that the consent of the patron, tacksmen, and other parties having interest, should be had, both to the separating and uniting of parishes.

This commission was limited to a year and day after 10th January 1622.

Charles I. upon his accession to the crown, having revoked all the grants of church-lands made by King James his father, a summons of reduction of these grants was executed in name of his Majesty's Advocate. Aug. 1626

This greatly alarmed the persons who were possessed of these

R 3 grants,

1628. &
1629.

grants, and occasioned an application to be made to the King in name of some of the grantees, to have their properties secured to them: the consequence of which was, that several commissions were granted by the King for settling those matters; and the several parties interested also submitted their respective rights to his Majesty; who pronounced four several decreets-arbitral thereupon. There were also several acts of parliament passed, and commissions granted for the better regulating all those affairs; the purport of which shall be hereafter explained as they occur in their order.

27th Jan.
1627.

In 1627, a commission was granted by the King under the great seal, to certain of the clergy, nobility, and barons, empowering them to treat with the proprietors concerning the erection and temporalities of benefices, teinds, parsonage and vicarage, and certain other matters and things, which his Majesty alledged were the property of the crown, or principally,

ty, and had been unlawfully acquired and possessed by his subjects. This commission was called the commission of *Surrenders and Teinds*; and by the tenor thereof, was only to subsist to the 1st of August 1627; but was afterwards renewed three several times, with some small variations, viz. 9th July 1630, 16th November 1630, and 7th January 1631.

The commissioners named in 1627, in consequence of a warrant from the King, gave directions to the several presbyteries, to make choice of the most fit and indifferent persons, within their respective presbyteries, to be sub-commissioners for trying the valuations of tithes, according to particular directions sent to them for that effect: and these nominations were ordered to be reported to the general commission.

Upon report of these several nominations by the respective presbyteries, commissions were issued by the general commission to the several persons named by the presbyteries;

byteries; and the powers granted to the subcommissioners are as follows: To try and inform themselves, by all lawful means and ways, of the true worth of the lands of each parish, in stock and teind, where the land hath been bruiked in stock and teind in time bygone, and what the lands pay presently, what they have paid in time bygone, and what they may pay of constant rent of stock and teind in time coming; and that they report to the general commission the just and true worth thereof, in constant rent, to their judgement; and also to inform themselves, by all lawful means, of the constant rent and worth of the teinds, both great and small, where the teinds have been drawn severally from the stock, by the titular or his tacksmen, not being heritors for the space of seven years, within fifteen years preceding the date of the commission.

By the said commissions, the subcommissioners were also empowered, in case the heritor should
desire

desire it, to try the rent of the land along with the teind, according to the true and constant rent of the land; and the commissions to the subcommissioners were published by a proclamation issued in the King's name, and under his signet.

By an act in 1633, it is ordained, That his Majesty shall have an annuity of 6 *per cent.* out of all the teinds of the kingdom, excepting the teinds then paid to bishops, teinds paid to ministers in name of stipend, for serving the cure, and to colleges, hospitals, and other pious uses. Ch. I.
p. 1633.
c. 15.

This annuity was granted by King Charles I. to James Livingston, a groom of his bedchamber, in security of a sum of L. 10,000 Sterling; which right was afterwards acquired by the Earl of Loudon: and in 1664, the levying of these annuities was stopped by the King's warrant; since which time, the King's annuity has not been levied. Stair's In.
b. 2. tit. 8.
§ 13.

By

Ch. I.
p. 1633.
c. 17.

By another act, in 1633, it is ordained, " That there shall be no
" teind-sheaves, or other teinds,
" parsonage or vicarage, led and
" drawn within the kingdom;
" but that each heritor and life-
" renter of lands shall have the
" leading and drawing of their
" own teind, the same being first
" truly and lawfully valued, and
" they paying therefor the price
" specified in the act, in case they
" be willing to buy the same, or
" otherwise paying therefor the
" rate of the teind settled by the
" said act: and it is thereby also
" declared, That the just and true
" rate of teinds is, and shall be,
" the fifth part of the constant
" rent which each land payeth in
" stock and teind, where the same
" are valued jointly; and where
" the teinds are valued apart and
" severally, that the just rate
" thereof is, and shall be, such as
" the same is already, or shall be
" hereafter valued and proved be-
" fore the said commissioners or
" subcommissioners, deducting the
" *fifth*

“ *fifth* part thereof for the ease of
“ the heritors; reserving always
“ liberty to such as shall find
“ themselves enormly hurt by the
“ leading of the said valuations,
“ to pursue for rectifying of the
“ same, before the commissioners
“ appointed by his Majesty and e-
“ states for that effect. And it is
“ also thereby declared, That the
“ price of all teinds which may
“ be sold, consisting either in mo-
“ ney, victual, or other bodies of
“ goods, is, and shall be, ruled
“ and estimate according to nine
“ years purchase; the prices of
“ victual, and other bodies of
“ goods whereof the teind consists,
“ being redacted in money, ac-
“ cording to the worth and price
“ of the victual and goods in each
“ part of the country to the which
“ the same is, and shall be prized,
“ and estimate, by his Majesty’s
“ commissioners, appointed, or to
“ be appointed, to that effect.”

The said act also provides, That
in case an heritor of lands life-
rented by another person, shall
purchase

purchase his teinds, the liferenter shall be allowed to draw his own teinds, upon payment of the rate at which they are valued; and that if the teinds are not purchased, both the heritor and liferenter, respectively, shall have the drawing of their own teinds at the said rates.

Ch. I.
P. 1633.
C. 19.

In 1633, a new commission was granted by parliament to several persons of each estate, for regulating the matter of tithes. By this commission, the commissioners are ordered to meet at Holyroodhouse, or Edinburgh; and they are empowered to prosecute and follow forth the valuation of whatsoever teinds, parsonage or vicarage, as were then unvalued; and “to receive the reports from the sub-
“ commissioners appointed with-
“ in ilk presbytery, of the valuation of whatsoever teinds led
“ and deduced before them, according to the tenor of the sub-
“ commissions direct to that effect; and to allow or disallow
“ the same, according as the same
“ shall

“ shall be found agreeable or disagreeable from the tenor of their subcommissions.”

“ The commissioners are also impowered to rectify whatsoever valuations, led or to be led, to the enorm prejudice of the titulars, and to the hurt and detriment of the kirk, and prejudice of the ministers maintenance and provision, or of his Majesty’s annuity; and also to appoint committees, or subcommittees, of their own number, to receive the reports of the said valuations made or to be made, and to receive, admit, and examine witnesses, and to take parties oaths, with their depositions, where the same is referred to oath; and to give such further power to the said committees or subcommittees of their own number, as they shall think fit; and if need be, to appoint subcommissioners, not being of their own number, within any parochine or presbiterie of the country, for leading

S

“ and

“ and deducing of the said valuations, and to receive the reports thereof, allow or disallow of the same; and, generally, to set down whatsoever order or course, which shall be thought fit and expedient for dispatch of the said valuations, rectifying thereof, or final closing of the same.”

The commissioners are also empowered, “ after the closing and allowance of the valuations of ilk kirk and parochin, to appoint, modifie, and set down, a constant and local stipend, and maintenance, to ilk minister, to be paid out of the teinds of ilk parochin, according to the tenor of the several acts of parliament:” And it is declared in the commission, that the provision to be made to ministers, shall not be under 8 chalders of victual, or 800 merks Scots, (*i. e.* L. 44, 8 s. 10 $\frac{2}{3}$ d. Sterling), unless when, upon special reasons given, the commissioners shall adjudge a less sum.

The

The commissioners are also im-
powered, “to divide ample and
“spacious parochins, where the
“same shall be found necessary
“and expedient, or to unite di-
“vers kirks, in whole or in part,
“to others, and to ratify and al-
“low, after trial and considera-
“tion, such union, or dismem-
“bering of parochins, as hath
“been formerly made by virtue
“of the former commissions.”

The commissioners are likewise
impowered “to order, that every
“heritor and liferenter of lands,
“shall have the leading of their
“own teinds, parsonage and vi-
“carage thereof, they paying the
“price contained in the act of
“parliament, in case they be wil-
“ling to buy the same from the
“titular having power to sell, or
“otherwise paying the rate of
“teind expressed in the said act:
“And to that effect, the commis-
“sioners are impowered to set
“down the prices of saleable
“teinds, according to the worth
“thereof in each part of the coun-

“ try, where the same grow and
“ are bred; and also to set down
“ such good and ample securities,
“ as may stand by law, both for
“ the buyers of teinds, to the ef-
“ fect the titulars may be fully
“ denuded in their favours; and
“ also for security to the titulars
“ and fellers of the price due to
“ be paid to them for the said
“ teinds; and also to set down the
“ securitie in favour of the titu-
“ lars and of the ministers, so far
“ as concerns the maintenance as-
“ signed to them, for good, thank-
“ ful, and timeous payment of
“ the rate of teind, where the same
“ are not, or cannot be fold; and
“ to discuss and determine all
“ questions which may arise be-
“ twixt the titulars and heritors,
“ anent the price of teinds, ac-
“ cording to the nature and qua-
“ litie of the rights to be sold,
“ whether the same be heritable
“ or temporal, and to proportio-
“ nate the price accordingly; and
“ also to divide the price of teinds
“ betwixt

“ betwixt heritors and liferenters
“ thereof, and betwixt titulars,
“ tacksmen, and others, who have
“ severall and distinct rights to the
“ said teinds saleable, according
“ to the qualitie of their rights;
“ and also to cause the titulars
“ who sell their teinds, to exhibit
“ their rights and titles, to the ef-
“ fect that they may be lawfully
“ denuded thereof, in favour of
“ the said heritors and liferenters
“ respectively, (without prejudice
“ to his Majesty’s annuity, &c.),
“ and to decide and determine in
“ all other points which may con-
“ cern the leading and drawing of
“ teinds, and buying of the same;
“ or payment of the rate thereof.”

It is also provided by the said
commission, “ That the vicarages
“ of each kirk being a severall be-
“ nefice and title from the parso-
“ nage, shall be severally va-
“ lued.”

This commission being only
temporary, severall new commis-
sions were afterwards granted by
S 3 parliament

W. & M. parliament to the like effect * ;
 1690 c. 10 particularly in 1690 and 1693:
 lb. 169. and in the last of these commis-
 c. 24. sions, there are some new rules
 laid down with respect to processes
 of sale of teinds, and allocation of
 ministers stipends.

Ch. II. By the commission granted by
 p. 1661. parliament 1661, it is declared,
 c. 61. That all and whatsoever valua-
 tions, acts, sentences, and decreets,
 done, concluded, and decerned,
 by virtue of any commission grant-
 ed by the pretended parliaments in
 1640, 1641, *and downwards to the*
restoration, shall stand valid, not-
 withstanding both the general and
 particular rescissory acts passed in
 that parliament, excepting such
 decreets and sentences given in
 favour of ministers for their sti-

* The dates of the several commissions granted by
 parliament are,

Parl. 1641, c. 30.
 1644, c. 24.
 1647, c. 32.
 1649.
 1661, c. 61.
 1663, c. 28.

Parl. 1672, c. 15.
 1685, c. 28.
 1686, c. 22.
 1690, c. 30.
 1693, c. 24.

pends,

pend, or for dividing, uniting, annexing, or building of kirks, which shall be found to have been unjustly or exorbitantly decerned; the determination whereof is referred to the commissioners, who are impowered to annul or alter such acts, sentences, and decreets, conform to the laws and practick preceding 1649.

In 1707, the power of these several commissions was vested in the Lords of Council and Session, and has continued so ever since. Anne, p.
1707.c.9.

By an act of King William, all tithes which had not before that time been heritably disponed, are declared to belong to the patron of the parish where the tithes lie; but subject always to tacks formerly granted, and prorogations thereof, as also to ministers stipends, and all other burdens to which the tithes were formerly subjected. W. & M.
1690.c.23
And by this act, the patron is obliged to sell to each heritor the tithes of his own lands, at *six years purchase*, according as the same shall

shall be valued by the commissioners.

W. & M.

p. 1693.

c. 26.

This last act was afterwards extended to the patrons of all parsonages, and other benefices, without exception.

CHAP. II.

Of the Judges, and other officers of the court, as established in 1707.

THOUGH the judges of this court are now the same with those of the court of session, yet they are two distinct courts. Each of them have their own proper officers and jurisdiction. The form of proceeding in both is in many respects the same, but in some particulars it is different.

The court itself is called *the commission for plantation of kirks and valuation of teinds*; and petitions, and other applications to the court, are addressed to *the Lords of Council and Session, as Commissioners for plantation of kirks and valuation of teinds.*

Nine

Nine of the judges are a quorum, as in the court of session.

There is only one principal clerk. This officer was formerly appointed by the Lord Register, and acted by deputation from him; but now the clerk has his commission from the King. There is also one depute-clerk, who acts by commission from the principal clerk; and both these officers have their commissions for life: and there is one extractor, appointed by the principal clerk.

By the act constituting the court, the macers of privy council, who attended the former commissions of parliament, are ordered to attend and officiate in this court. There are now only two macers who attend the court; these have been named by the judges.

The fees of all these several officers are settled by two acts of ^{17th Nov. and 22d Dec. 1708} federunt of the court in 1708.

The court is appointed to sit every Wednesday in the afternoon ^{Anne, p. 1707.c.9.} during the sitting of the session: it now sits each Wednesday immediately

diately after the court of session rises.

C H A P. III.

Of the Jurisdiction of the Court.

Anne, p.
1707.c.9.

THE jurisdiction of the court is defined by the act constituting it. By that act, the Lords of Session are impowered to judge and determine “ in all affairs and “ causes whatsoever, which by “ the laws and acts of parliament “ of this kingdom, were formerly “ referred to, and did pertain and “ belong to the jurisdiction and “ cognisance of the commissions “ formerly appointed for that effect, as fully as the Lords do, “ or may do, in other civil causes; “ and particularly to determine in “ all valuations and sales of teinds, “ and to grant augmentations of “ ministers stipends, prorogations “ of tacks of teinds, to disjoin “ too large parishes, to erect and “ build new churches, to annex “ and

“ and dismember churches as they
“ shall think fit, conform to the
“ rules laid down, and powers
“ granted, by the 19th act of par-
“ liament 1633, 23d and 30th
“ acts of the parliament 1690, and
“ 24th act of the parliament 1693,
“ in so far as the same stand un-
“ repealed; the transporting of
“ kirks, disjoining of too large
“ parishes, or erecting and build-
“ ing of new kirks, being always
“ with the consent of the heritors
“ of three parts of four at least,
“ of the valuation of the parish
“ whereof the kirk is craved to be
“ transported, or the parish to be
“ disjoined, and new kirks to be
“ erected and built; the minister,
“ in the mean time, to serve the
“ cure in the present kirk of the
“ parish.”

The records of this court having Anne, p. 1707.c.9.
been burnt by an accidental fire,
in order to supply this loss, it is
by the said act ordained, “ That
“ all authentic extracts from the
“ said records be brought in; and
“ being presented to the Lords, be
“ recorded

“ recorded in a particular register;
 “ and that the extracts so brought
 “ in, be kept by the Lord Clerk-
 “ Register and his depute, clerks
 “ to be appointed by him for that
 “ effect, as their warrants; which
 “ shall be held as valid and au-
 “ thentic as the principal warrants
 “ themselves.” The Lord Regi-
 ster, and his deputies, are ordain-
 ed to give new extracts *gratis* upon
 giving in the old ones; and ex-
 tracts from the new record are de-
 clared to be as effectual as the old
 ones. And upon proper evidents
 and adminicles, the court is au-
 thorised to make up the tenor of
 decreets, whereof extracts are a-
 missing, and the registers lost in
 the fire.

Anne, p.
 1707. c. 9.

W. p.
 1690.
 c. 30.

The court has also a power of
 judging of the sentences of for-
 mer commissions, as well as re-
 viewing those of the present com-
 mission; but under a proviso,
 That the ministers of the gospel,
 and their successors, shall not be
 prejudged of the stipends, either
 then possessed by them, or which
 had

had before that time, or should thereafter be, modified to them by the commission, at the rates before mentioned.

The judges of this court have Ch. I.
likewise a power of regulating the P. 1633.
form of judicial proceedings in the C. 19.
court.

T PART

P A R T. II.

Of the Form of Process.

HAVING given a general view of the constitution of this court, and of the purposes for which it was first erected, the form of process falls next to be considered; which, for method's sake, shall be treated of in the following order.

1. Of the preliminaries of process.
2. Of the proceedings in court after the cause is inrolled.
3. Of extracts.

And as the form of proceeding in this court is in a great measure similar to that in the court of session, such particulars only shall be mentioned as are different from the form in that court, referring to the former part of this treatise for the rest.

CHAP.

C H A P. I.

Of the Preliminaries of Process.

S E C T. I.

Of the Pursuer and Defender.

BEfore proceeding to the particular forms of process, it will be necessary to consider who are the proper pursuers and defenders in the several actions usually brought before this court.

In general, every person who has a claim subject to the judgment of the court, may be a pursuer; and every person who has an interest to object to such claim, must be called as a defender.

These pursuers and defenders are regulated according to the nature of the several actions in which they are concerned; and shall be

considered in the following order.

1. A process of valuation and sale of tithes, may be brought at the instance of any heritor or liferenter who has right to lands, or other real subjects, out of which tithes are payable; and the proper defenders in this action are, the titular, or patron if there is no titular, tacksmen in possession of drawing the tithes, and minister of the parish where the tithes lie.

2. Where a valuation of tithes has been made by the subcommissioners, and has not been approved by the general commission, a process of approbation of such valuation is competent, either at the instance of the heritor or liferenter of the lands out of which the tithes are payable, or of the titular, or patron if he has a right to the tithes, and their tacksmen in possession of drawing the tithes. The proper defenders to this action are; the titular, or patron if he has right to the tithes, heritor, liferenter, tacksmen in possession
of

of drawing the tithes, and minister of the parish where the tithes are produced, leaving out the pursuer.

In the general commission granted by parliament in 1663, and other subsequent commissions, there is no power given to the commissioners to receive the reports of the sub-commissioners; which gave rise to a doubt as to the powers of the present commission to approve of these reports; and this was supported by an additional plea of prescription: but both these objections to the competency of a process of approbation, have been repelled by the court; and the point is now finally established by a decree of the house of Lords, in the case of the heritors of Drymen*.

3. A process of modification or locality of ministers stipend, may be brought, at the instance, either of the titular, or patron, if he has

* 1744, Lord Monzie against Officers of State; — 1746, Murray of Philiphaugh against Lord Blantyre; — 2d February 1757, Duke of Montrose, and other heritors of the parish of Drymen, against Officers of State.

right to the tithes: it may also be brought in name of the minister serving the cure. And the proper defenders to this action are, the titular, patron, tackfman in possession of drawing the tithes, and the heritors and liferenters liable in payment of tithes in the parish, leaving out the pursuer.

4. A process for prorogation of a tack of tithes, may be brought at the instance of the tackfman. The proper defenders to this action are, the titular, or patron, if he has a right to the tithes, and heritors and liferenters whose tithes are comprehended under the tack.

Anne,

1707.c 9.

5. Though, in transporting of churches, disjoining of too large parishes, and erecting or building of new churches, the consent of the heritors of three parts of four, at least, of the valuation of the parish, is required *; yet an action

* The consent of three fourths of the heritors was found not to be necessary in an erection of a church within a royal borough; Magistrates of Glasgow against the Presbytery of Glasgow, 3d August 1763.

for

for these purposes may be brought, either at the instance of the patron, or of the presbytery alone; and the proper defenders in such action are, the titular, patron, heirs, liferenters, and ministers of the parishes to be united or disjoined, and the presbytery within whose bounds such parishes lie; leaving out the person at whose instance the action is brought.

6. Any person who thinks himself injured by a decret, may bring a process of reduction of it; and all the persons concerned in the decret to be reduced, or their representatives or disponees, must be cited as defenders.

Here it may be proper to observe, that by the commission 1690 it is provided, that “ where
“ valuations are lawfully led a-
“ gainst all persons having inte-
“ rest, and allowed by former
“ commissions, the same shall not
“ be drawn in question, nor rec-
“ tified, upon pretence of enorm
“ lesion at the instance of the mi-
“ nister, (not being titular), or at
“ the

“ the instance of their Majesties
 “ Advocate, in respect of their
 “ Majesties annuity; except it can
 “ be proven, that collusion was u-
 “ sed betwixt the titulars and he-
 “ ritors, or betwixt the procura-
 “ tor-fiscal and the heritors and
 “ titulars; which collusion is de-
 “ clared to be, when the valuations
 “ are led with the diminution of
 “ the third part of the just rent
 “ which was payable the time of
 “ the valuation; which diminu-
 “ tion shall be proven by the par-
 “ ty's oath.”

Anne, 7. Every person who has an in-
 1707, c. 9. terest in a decret which has been
 lost, and whereof the record was
 destroyed by the fire which hap-
 pened in the office in 1700,
 may raise a process of proving the
 tenor of such decret; and every o-
 ther person having interest in the
 decret, must be called as defend-
 ers to the action.

If, at the time of commencing
 any of these actions, the parish
 concerned shall happen to be va-
 cant, the presbytery must be call-
 ed

ed as a party to the action: and to save expence in executing the summons, all the members of the presbytery may be cited when assembled in presbytery, by delivering one copy of citation to the moderator in name of the presbytery; but if the summons is not executed while the presbytery is sitting, each of the members must be cited in common form.

When his Majesty has an interest in any of these several processes, the officers of state are called as defenders to the action for his Majesty's interest, by affixing an edictal citation on the wall of the court of exchequer *.

* The officers of state at present are well known. Those before the union were,

1. The Chancellor,
2. The Treasurer,
3. The Lord Privy Seal,
4. The Secretary,
5. The Lord Register,
6. His Majesty's Advocate,
7. The Treasurer Depute,
8. The Lord Justice-Clerk.

SECT.

S E C T. II.

Of the Summons and Execution.

THE summons in this court, as in the court of session, is issued in the King's name, and under his signet, and is executed by a messenger at arms; but it differs from that of the court of session in the following particulars.

Anne, p.
1707, c. 9.

1. The summons in this court is signed by the clerk of court, and not by a clerk to the signet.

2. It is issued blank, and may be executed before the libel is filled up; whereas the summons in the court of session must be complete before it can pass the signet.

3. The summons proceeds upon one diet of six days, in case the defender resides in Scotland; and sixty days, if he is out of Scotland: if the defender resides in Orkney, or Shetland, it must be on forty days warning.

4. It

4. It is not necessary that the defender shall get a full copy of the libel when the summons is executed against him.

The parsonage and vicarage Ch. I. p. 1663, c. 19 tithes being separate benefices, must be valued severally; and therefore a libel in a process of valuation ought to contain that separate conclusion.

S E C T. III.

Of the calling and inrolling of Summonses.

AFTER the day of comparance is passed, the summons must be called by the clerk on the Wednesday immediately before the sitting of the court; and if appearance is made for any of the defenders, it must also be given out and returned, as in the court of session; but the form of tabling and returning defences with the process is not requisite.

The court is ordained to call Anne, 1707, c. 9.
and

and discuss processes summarily, conform to a roll to be made up and kept by the clerk.

A. S. 11th
June 1707

By an act of federunt of this court in 1707, the clerk is ordered to keep a book of inrolment of causes; from which he is to make out, and affix on the walls both of the inner and outer house, two rolls of causes each Monday morning, viz. one roll of *ordinary actions*, and another roll of *concluded causes*. But the last part of this act is gone into disuse, and the causes are now all inrolled in one roll. The court also generally calls all the causes in the roll at one federunt.

A. S. 31st
Jan. 1711

By an act in 1711, the clerk is ordered to give notice to his Majesty's advocate, or solicitor for tithes, of all causes wherein the officers of state are called as defendants, as soon as the summons is called.

SECT.

S E C T. IV.

Of tithes excepted from the acts for sale.

THough the owners of real property in Scotland in general, enjoy the particular privilege, not only of valuing and drawing their own tithes, but also of purchasing them at an easy rate; yet it is to be observed, that the privileges of purchasing is subject to the following exceptions.

1. Tithes allocated for a stipend to a minister.

2. Tithes of lands which have w. p. been feued out by an heritor having right both to stock and tithe, ^{1693.} ^{c. 24.} either without the tithes, or with a reservation of them.

3. Tithes formerly belonging to bishops, now to the King.

4. Tithes belonging to colleges and hospitals, or mortified for pious uses before 1693.

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The several proprietors of those tithes which are excepted, cannot be compelled to sell them, though all such tithes may be valued; and the proprietors of the subjects out of which these tithes are payable, are intitled to draw their tithes upon payment of the proven value thereof, excepting the tithes payable to ministers in name of stipend, which must be paid either in kind or money, according as they are ascertained, either by the use of payment, or by a decret in favour of the minister.

C H A P. II.

Of the proceedings in court after the cause is inrolled.

AFTER a summons of valuation and sale is executed, the pursuer is intitled to draw his own tithes from the date of citation; but if he shall not insist in his process, and shall allow a protestation
 W.&M.p. 1693.c.24 to go against him, such pursuer shall

shall not be intitled any longer to draw his own tithes.

As there is no minute-book in this court, this protestation cannot be obtained until the summons is called in course of the roll; when the defender's advocate may insist for such protestation, if the pursuer does not chuse to proceed in his action.

The proceedings after the cause is inrolled, are various, according to the nature of the several actions. These shall be treated of under the following heads: 1. General rules applicable to every process; 2. Rules peculiar to particular actions.

S E C T. I.

General rules applicable to every process.

1. **A**LL processes in this court are heard by the court in the first instance, and not by an

U 2
Ordinary,

Ordinary, as in the court of session.

A. S. 8th
Nov. 1738

2. When a cause is called in course of the roll, and deleted upon non-appearance of the pursuer, the clerk is discharged to inrol it again, until an amand of 10 s. is paid to the poor's box.

This act is gone into disuse.

The commissioners appointed by Forbes on the commission 4th April 1627, 'Tithes, c. 9. § 2. made an order, that all procurators compearing before them, should have written mandates registered in the commission-books. This is now in disuse. But a decret given upon an advocate's consent, not subscribed by him, was found null, 20th July 1664.

3. At the first calling of the cause in course of the roll, parties are heard on the libel and defences respectively; after which, if the cause is ripe for a decision, the court will give judgement: but if a proof is necessary, the court will pronounce an act of *litifcontestation*, allowing a proof to both parties, and grant diligence for citing

citing witnesses, and a commission if required.

4. Upon reporting the execution of the first diligence, the court will grant a second diligence if required. This is obtained by a motion from the bar upon calling the cause, after being inrolled for that purpose.

5. When the proof is concluded, and the day assigned by the act is elapsed, the cause may be inrolled; when the court will make a *visandum* with the proof, and grant circumduction, and will remit the cause to an Ordinary to prepare the state; after which, the proceedings are the same as in a concluded cause in the court of session.

6. The Ordinary for examining witnesses, and preparing states in this court, is generally the Lord Ordinary officiating in the outer house in the court of session for the time; but when an Ordinary has prepared a state in a process of modification, it is usual to remit

the preparing of the state in the locality to the same Ordinary.

7. The causes in this court which are remitted to Ordinaries, are inrolled in the Lord Ordinary's hand-roll; and are called at the side-bar in the morning, with the other causes depending before the same Ordinary in the court of session.

8. When a party thinks himself injured by an interlocutor of a Lord Ordinary, he may offer a representation to the Lord Ordinary against such interlocutor, in the same way as in the court of session; but neither the time for giving in such representations, nor the number of them, are limited.

9. The business of the Lord Ordinary in this court being only to examine witnesses, or to prepare the states of proof, and to report, there is seldom occasion to complain to the court of their interlocutors; and therefore there is no act of sederunt limiting the time for giving in petitions to the court complaining of such interlocutors.

10. By

10. By an act of federunt in A. S. 31st
 1722, the clerk and his depute are Jan. 1722
 discharged to receive any more
 petitions than one against *an inter-*
locutor of the court; and it is there-
 by declared, "That the Lords
 " will not receive any more re-
 " claiming petitions than one, un-
 " less upon new documents or
 " matters of fact, and sufficient e-
 " vidence given that the same
 " was recently come to the party's
 " knowledge."

11. Petitions against interlocu- A. S. 22d
 tors of the court are ordered not Feb. 1749
 to be received, unless they are gi-
 ven in on or before the *third* fede-
 runt-day after the interlocutor re-
 claimed against is pronounced.

12. Petitions, answers, and in- A. S. 7th
 formations, are ordered to be put Dec. 1709
 into the Lords and clerks boxes *
 on the Tuesday afternoon prece-
 ding the day of advising; with the
 exception of the following peti-
 tions, which may be given in to

* The Lords boxes are the same in this court as
 in the court of session; and papers must now be put
 in before twelve o'clock.

court without being put into the boxes.

(1.) Petitions for recording decreets of former commissions.

(2.) Petitions against acts or decreets ready to be extracted, when there is no time for making copies of the petition.

A.S. 26th
Mar. 1707

13. Anciently summons of wakening was not necessary in this court; but the processes which had depended before former commission-courts, not having been called for several years before the last appointment of this court in 1707, the court made an act, ordering such processes to be wakened by a summons; and though this act seems only to relate to processes then depending, yet by use it is now extended to every process in the court which has lain over uncalled for year and day, as in the court of session.

14. If any of the defenders shall happen to die during the dependence of the action, his heir may be called by an incident diligence, a summons of transference not being

ing necessary in this court as in the court of session; and such diligence may be obtained by a motion from the bar upon an inrolment.

S E C T. II.

Rules peculiar to particular actions.

HAVING premised the general rules which are applicable to every action in this court, the particular matters peculiar to each action shall next be stated.

§ I. *Process of Valuation and Sale.*

In a process of valuation and sale, the chief things to be observed with respect to the proof is, That there shall be proper evidence, not only of the present rent of the lands out of which the tithes to be valued are payable, but also of the rent which has been paid for these lands for seven years past; and if the tenants have been in use
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to pay grassum, these should likewise be proved.

If any part of the lands are in the natural possession of the heritor, a proof must be taken of the annual produce of such lands, and what they would yield if let to a tenant. It is also necessary to have a clear proof of the value and expence of improvements made on all the lands within seven years preceding the taking of the proof; because a reasonable deduction will be allowed by the court for such improvements in valuing the tithes; and, for the same reason, a distinct proof should be taken of the rent of mills; and all legal deductions, either from the rents or tithes, should also be proved.

The titular being liable to the payment of the King's annuity while he retains the property of the tithes, there is no deduction made upon that account in a process of valuation; but there is a deduction given for it in a process of sale; and the purchaser is decreed

creed to relieve the feller of the tithes of the said annuity.

If the tithes have been valued Ch. I. separately before 1633, a fifth part P. 1633. thereof must also be deducted in C. 17. reckoning the price. This deduction is called the *King's ease*.

The titular and patron respectively, should be ordained to produce their title-deeds and rights to the tithes; because the price is more or less according to these several rights; the titulars being intitled to *nine*, and the patron only W. & M. p. 1690. c. 23 to *six* years purchase; and in case there are several persons pretending to have an interest in the tithes, such as heritors and liferenters, titulars, patrons, or tacksmen, it should be ascertained by the court what share each of the several patrons are to take of the price.

§ 2. *Process of Modification and Locality.*

The action in this court, at the instance of a minister for his stipend, consists of two distinct branches;

branches; one a modification, the other a locality. The effect of the first of these is to have the quantum of the stipend ascertained; the effect of the other is to rate the proportion to be paid out of each heritor's tithes.

Besides the stipend to the ministers, there is commonly a sum modified for defraying the expence of communion-elements, which is more or less, according to the number of people in the parish; and seldom exceeds L. 5 Sterling.

In this process, the minister generally gives in a rental of the lands liable to tithes in his parish, and refers the verity thereof to the respective oaths of such of the defenders as are of age, and brings a proof of the rents of the lands of such of them as are minors.

A. S. 14th
Feb. 1739 - When an act is pronounced for taking this proof, the court assigns the same term to the heritors to produce their several rights to their teinds, with certification.

This

This certification has little or no effect, there being no penalty annexed to it; by which means these causes are often extremely tedious.

Though the two conclusions in this action are contained in one libel, yet a decret may be obtained in the modification, without proceeding to the locality; the effect of which is, to make the stipend a real lien on the tithes of the whole parish, and to subject the intromitters with the tithes *in solidum* to payment of the stipend, to the amount of their several intromissions; but after a decret of locality is extracted, each heritor is only liable for his own proportion.

The titular having been originally proprietor of all the tithes of the parish, he had power to allocate the stipend upon any part of the tithes he pleased, unless he was barred from making such allocation by some deed of his own, such as a tack, or disposition of the tithes, in favour of some other

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person.

person. This privilege was also extended to patrons having right to tithes by the acts 1690 and 1693. When the privilege of purchasing their own tithes was given to heritors, the titulars and patrons, and their tacksmen, were in use to disappoint the heritors, by allocating their tithes to the ministers. To remedy this inconvenience, by the commission 1693

W. & M. “ it is statute and ordained, That
 p. 1693. “ after citation, it shall not be in
 c. 24. “ the power of the patrons, titulars, or tacksmen, to make an allocation of the pursuer’s teinds solely, but only proportionally of his and the other teinds within the parish, and within his right; excepting always, that the teinds of the lands belonging in property to the patron, titular, or tacksmen, shall be free of any part of the allocation, if there be sufficient teind besides.”

The order observed in allocating the stipend is as follows:

1. Free tithes payable to the titular

tular or patron, respectively, out of other heritors lands.

2. The tack-duties payable to the titular or patron respectively, for tithes let by them, and also the feu-duties, if any be, payable to the titular or patron for tithes feued by them.

3. Tithes of other heritors lands, let in tack by the titular or patron respectively.

4. Tithes heritably disposed by the titular or patron, and the tithes of the lands belonging to the titular or patron proportionally.

The *decimæ incluse*, which have been disposed by churchmen, with the stock, before 1587, are not subjected to the burden of the minister's stipend, and therefore cannot be localled.

The clerk usually makes out the calcul and scheme of allocation, without previously shewing to the parties a state of the order on which it is to proceed, which is often the occasion of much trouble and expence. If such state were

to be made out, and an order given by the Lord Ordinary to all parties to see and object to it, previous to the making of the calcul, all that unnecessary trouble and expence might be saved, especially if a certification were granted *contra non producta*.

§ 3. *Process of Prorogation of a Tack.*

Vide Forbes on
Tithes, c.
7. § 5.

The process of prorogation of tacks may either proceed on a summons, or the decret of prorogation may be insisted for in the process of modification and locality, where all parties having interest are called; in which case, a summons has been found not to be necessary.

In this process, the time of prorogation is granted in proportion to the loss sustained by the tacksmen; and, for that reason, the court, before pronouncing a decree, often remits to an accountant to make out a calcul of the loss, and of the number of years which ought

ought to be granted for the tackf-
man's indemnification.

When an augmentation of a mi-
nister's stipend has proceeded on a
voluntary agreement between the
patron and minister, it has been
decided by the house of Lords,
that the tackfman is not intitled to
a prorogation on that account.

June 1732
Earl of
Galloway
against the
Heritors of
Whithorn

The other actions in this court
having nothing in their form of
proceeding peculiar to them, it
will suffice to refer to what has
been already said upon that head
in the former part of this treatise.

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PART



PART III.

Of Extracts.

THERE is no minute-book kept of the proceedings of this court: the only regulations made by the court with respect to extracts is, "That no act or decret can be extracted, until the Lords shall have met another diet after pronouncing thereof."

Anne, p.
1707, c. 9.

If a party is possessed of an extract of a decret before 1707, he may apply to the court by petition to have it recorded; and upon giving in the old extract, he is intituled to get a new one *gratis*.

F I N I S.

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